ASYNCHRONOUS TRIALS: A NEW APPROACH TO HIGH-VOLUME CIVIL ADJUDICATION

HENRY ZHUHAO WANG*

ABSTRACT

For thousands of years, trials were held in brick-and-mortar courthouses. Then COVID-19 ravaged the world, forcing many businesses and institutions—including courts—to move their operations online. For the first time, many people experienced the benefits of online trials that are held via videoconference software such as Zoom. But Zoom fatigue is real. Now that the pandemic has lessened and courts are no longer urgently adapting to a virtual format, we must more thoughtfully consider what judicial innovations should come next.

Outside of the courtroom, this revolution in communication methods has profoundly affected people's daily lives: we have switched from almost entirely synchronous human interactions, such as phone calls and in-person meetings, to diversified asynchronous communication methods, such as texts, voicemail, email, and social media. This revolution is characterized by a generational divide: younger generations are both more accepting of and more dependent on asynchronous communication.

This Article proposes pairing trials and asynchronous communication to produce asynchronous trials for high-volume civil adjudication. Some international jurisdictions and a few state courts have already started to explore this possibility. Most courts in the United States, however, have been slower to realize asynchronous trials' potential. This Article explains how the U.S. synchronous tradition at common law motivates widespread hesitancy—one might even say hostility—toward asynchronous trials. It also discusses existing U.S. and international asynchronous trial initiatives, explores the pros and cons of asynchronous trials, and provides preliminary proposals for developing procedural and evidentiary rules to govern asynchronous trials.

* Tallahassee Alumni Professor, Florida State University College of Law. I am grateful to the 2024 Evidence Summer Workshop at Vanderbilt Law School, Florida State University College of Law Faculty Summer Workshop, and Leverhulme Visiting Professorship at Northumbria Law School (U.K.), where early drafts of this Article were presented. For helpful comments, my thanks to Ronald J. Allen, Robert Atkinson, Nadia Banteka, Shawn Bayern, Edith Beerdsen, William Berry, Alex Biedermann, David Caruso, Ed Cheng, Elissa Gentry, Shi-Ling Hsu, Ed Imwinkelried, Steve Johnson, Tomer Kenneth, Leandra Lederman, Jake Linford, Rebecca Mitchell, Alex Nunn, Aviva Orenstein, Sue Provenzano, Gustavo Ribiero, Justin Sevier, David Sixsmith, Emily Spottswood, Michael Stockdale, Catherine Struve, Giovanni Tuzet, Kelli Williams, and Maggie Wittlin. My thanks also to Alexandra Sainz for excellent research assistance. And, finally, I owe a sincere debt of gratitude to all the wonderful editors at the *Denver Law Review* for their fantastic work on this Article.

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INTRODUCTION

> "Once one gets past the fact that the word 'asynchronous' is impossible to pronounce or spell, it is an interesting concept . . . ." –Maxi Scherer[1]

Lawsuits have traditionally been resolved through synchronous trials: proceedings where the parties and a presiding judge are both present in the same place at the same time to resolve a dispute. Even in the years since the COVID-19 pandemic, this centuries-old practice has not changed much; parties still convene synchronously with the judge, although sometimes in a virtual courtroom instead of a physical one.

Asynchronous trials offer a different approach to legal proceedings. In an asynchronous trial, the parties and presiding judge would not convene in a physical or digital space at the same time but would instead correspond primarily by exchanging text, voice, photographic, and video communications on an online platform.[2] Leading research institutions such as the American Law Institute (ALI)[3] have already taken note of this judicial innovation, and several state courts are currently developing pilot programs. For instance, acting on the Florida Bar's recommendation, the Florida Supreme Court recently issued an administrative order authorizing the state's judicial circuits to pilot "online court" for resolving small claims cases—which can be done asynchronously or through a combination of

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1. Maxi Scherer, *Asynchronous Hearings: The Next New Normal?*, KLUWER ARB. BLOG 1 (Sept. 9, 2020), https://arbitrationblog.kluwerarbitration.com/2020/09/09/asynchronous-hearings-the-next-new-normal/.

2. To gain a quick understanding of how asynchronous trials might function, see, for example, *MI-Resolve Civil System—How to Use Mi-Resolve*, MICH. CTS.: OFF. OF DISP. RESOL., https://www.courts.michigan.gov/4a9755/siteassets/videos/how-to-use-mi-resolve.mp4 (last visited Feb. 18, 2025) (showing a short video demonstration of MI-Resolve, a platform for asynchronous hearings). There are two primary ways in which an asynchronous trial can unfold. One way is through "asynchronous video presentation," in which all aspects of a trial—including opening arguments, testimonial and documentary evidence, closing arguments, and the judge's instructions—occur synchronously and are video recorded, allowing the court to later edit the recording. Triers of fact (typically, lay jurors) can then watch the trial later according to their own schedule (asynchronously). *See* Christopher Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 135, 143–44 (2021). The second way to conduct an asynchronous trial (and the focus of this Article) is through *asynchronous participation in a trial*, in which participants' communications do not have to happen at the same time. The parties, their lawyers, the witnesses, and the presiding judge communicate with one another through posting mostly written entries at different times on a court-annexed, online platform. *See* MASS. ACCESS TO JUST. COMM'N, REPORT OF THE ONLINE DISPUTE RESOLUTION COMMITTEE 2, 6, 19 (2021), https://massa2j.org/wp-content/uploads/2021/08/FINAL-Report-of-the-Online-Dispute-Resolution-Committee-MA-A2J-Commission-July-2021-7.28.21.pdf ("[P]arties should be able to access the system whether or not opposing parties are participating online at the same time.").

3. For ALI's Current Projects, see *Principles of the Law, High-Volume Civil Adjudication*, AM. L. INST., https://www.ali.org/projects/show/high-volume-civil-adjudication (last visited Jan. 18, 2025) ("ALI drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education."). My understanding is that the ALI reporters (David Freeman Engstrom, David Marcus, Jessica Steinberg, and Lauren D. Sudeall) who are leading this project on high-volume civil adjudication are planning to include a chapter on court technology that will address asynchronous hearings; that chapter, though, has yet to be drafted.

asynchronous and synchronous adjudication.[4] State courts in Alaska,[5] Michigan,[6] New York,[7] and Utah[8] have implemented similar pilot programs.[9] Moreover, the United States is not the only country exploring this frontier: Canada, China, members of the European Union, India, Singapore, and the United Kingdom are also piloting online court programs with asynchronous elements.[10]

These pilot programs are largely judicial responses to a practical reality: in today's world, asynchronous communication is the norm. For most of human history, geographic limitations almost entirely dictated the ordinary person's social activities.[11] Most human communication was conducted synchronously through telephone calls and in-person meetings. Asynchronous communication was available to some degree, but it was often either significantly less efficient due to time delays (e.g., mailed correspondence) or cost prohibitive for large swaths of the population (e.g., telegraph or fax communications).[12]

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4. *See* Sup. Ct. of Fla., No. AOSC23-41, In Re: Online Dispute Resolution in the Trial Courts; Piloting Online Court (July 18, 2023), https://supremecourt.flcourts.gov/content/download/873503/file/AOSC23-41.pdf. For a detailed discussion, see *infra* Section I.C.2.c.

5. *See* Press Release, Alaska Ct. Sys., Online Dispute Resolution Platform for Self-Represented Litigants (Jan. 16, 2024), https://courts.alaska.gov/media/docs/2024/pr-akodr.pdf ("AK ODR may speed up the resolution process because it's available 24/7, and participants can respond at their own pace, reducing delays.").

6. *See Resolve a Dispute Online with MI-Resolve*, MICH. CTS.: OFF. OF DISP. RESOL., https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mi-resolve/ (last visited Jan. 19, 2025) ("MI-Resolve is an online system where you and the other party can have a text-based conversation along with a trained mediator to see if you can resolve the matter."). For a detailed discussion, see *infra* Section I.C.2.b.

7. *See* ONLINE CTS. WORKING GRP. OF THE COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S CTS., INITIAL REPORT ON THE GOALS AND RECOMMENDATIONS FOR NEW YORK STATE'S ONLINE COURT SYSTEM 19, 22 (2020) [hereinafter GOALS AND RECOMMENDATIONS] ("Parties can resolve disputes quickly, asynchronously, and without needing to physically attend court. . . . Negotiations occur asynchronously, so users can respond to, and engage with, the other party and the mediator on their own time.").

8. *See* Utah Sup. Ct., Standing Order No. 13, at ¶ 1(a) (rev. Jan. 27, 2021), https://legacy.utcourts.gov/rules/urapdocs/13.pdf. For a detailed discussion, see *infra* Section I.C.2.a.

9. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 1–2, 8–10 (The MA Committee emphasizes the importance of *asynchronous* communications in online dispute resolution: "Many definitions have been offered for ODR. The Committee understands it as an online process in which the parties, by themselves or with the assistance of a third party neutral, resolve their dispute to the parties' mutual satisfaction. It is not simply online mediation or a virtual court hearing, though mediation assistance is often offered as a resource if party negotiations break down. *Key features* include that it is court-annexed, meaning it is an integral part of the court system; that *it is asynchronous*, meaning communications do not have to happen at the same time; and that it is technology-based, meaning an internet platform replaces in-person mediations or hearings.") (emphasis added); *see also* Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims?*, 15 N.Y. DISP. RESOL. LAW. 42, 42 (2022).

10. For a detailed discussion, see *infra* Section II.B; *see also* Chen Xi, *Asynchronous Online Courts: The Future of Courts?*, 24 OR. REV. INT'L L. 39, 51–64 (2023); MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 11–13.

11. *See* Colin Rule, *Online Dispute Resolution and the Future of Justice*, 16 ANN. REV. L. & SOC. SCI. 277, 278 (2020).

12. *See* Brian Dodson, *Plug Pulled on the World's Last Commercial Electric Telegraph System*, NEW ATLAS (July 17, 2013), https://newatlas.com/last-telegraph-message/28314/ (explaining that in 1860, a transcontinental telegram was very expensive and priced by the word, while transoceanic messages were even more expensive).

Twenty-first-century technology has flattened the limitations of time and space.[13] Internet-based services and interpersonal software provide convenient and affordable platforms for people to communicate asynchronously, significantly changing people's communication habits, work routines, and lifestyles.[14] A typical professional today might reply to an email that they received only minutes earlier before hopping onto a Peloton bike in their living room to work out with an on-screen trainer who recorded the video in a cardio studio one week prior. While biking up a virtual mountain, this professional might listen to the latest episode of their favorite podcast that was uploaded two days earlier. Next, they receive another email, notifying them that their counterpart just cosigned a contract via DocuSign. These quick and almost automatic tasks are all asynchronous activities that would have been unthinkable thirty years ago.

Modern asynchronous communication trends are even more pronounced in the younger generations. As Maxi Scherer points out, anyone who lives with teenagers knows that they barely use synchronous communications—such as live phone conversations—anymore.[15] Text messages, emails, and asynchronous chats on various social media platforms have replaced those synchronous methods.[16]

Historically, changes in legal practices have been notoriously difficult and slow, especially when the judiciary is involved.[17] As Colin Rule observes,

> Technology has encroached around the edges of legal practice in areas like electronic filing, research, and case management, but the actual courtroom process still looks very similar to what it looked like back in 1980. A lawyer plucked from 70 years ago and dropped into a modern courtroom could probably still do an adequate job.[18]

However, despite the legal field's resistance to technological change, the COVID-19 pandemic made transformation urgent and unavoidable—even for aspects of the judicial process like the jury trial. At the peak of the pandemic, online trials were the only safe and viable option, and they may have even been constitutionally necessary to respect defendants'

13. Rule, *supra* note 11, at 278; *see also* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 175–76 (2005).

14. Rule, *supra* note 11, at 278, 283 ("If you look around, it is hard to deny that technology is sparking major transformations in the way humans interact with each other.").

15. *See* Scherer, *supra* note 1, at 3. For example, my teenage son told me that he still has random phone chats with his friends but absolutely hates to pick up any phone call from an unknown number. In today's etiquette, a cold call without a text preceding it is deemed rude. *See, e.g.*, Andy Cohen, *Text Before Calling: Five New Phone Etiquette Rules For 2023*, CJVR FM (Oct. 5, 2023, 8:53 AM), https://www.cjvr.com/2023/10/05/text-before-calling-five-new-phone-etiquette-rules-for-2023.

16. *See* Scherer, *supra* note 1, at 3.

17. *See, e.g.*, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 734, 742 (1906) ("[O]ur system of courts is archaic and our procedure behind the times.").

18. Rule, *supra* note 11, at 279.

speedy-trial rights.[19] And remarkably, this change has lasted: online hearings are now a routine practice in U.S. and international courts, even as the effects of the COVID-19 pandemic have lessened.[20]

In fact, even before the pandemic-driven changes, most parts of modern civil procedure were already asynchronous, including (1) the process for filing written pleadings; (2) discovery tasks such as interrogatories, requests for production, and requests for admission; (3) pretrial motions; and (4) most of the appellate process. But for actual trials, whether bench or jury, participants have always exchanged arguments and evidence synchronously: either in person, with everyone present in the courtroom, or remotely, with participants logged on to a designated videoconference platform at the same time. Can trials be held asynchronously too? Is now the time to make a change and allow trials to be held fully or at least partially asynchronously?

This is a complicated question. In his book *Online Courts and the Future of Justice*, legal futurist Richard Susskind advocates for synchronous trials to give way, at least partially, to asynchronous ones.[21] However, there is strong opposition to this proposal. At a Judicial Institute for Scotland conference at which Susskind spoke, former Scotland Solicitor General Paul Benedict Cullen expressed distaste for asynchronous hearings. He argued that "[t]he technology acts as a barrier, inhibiting free-flowing and spontaneous dialogue. The interchange becomes strained and difficult. As a result, the quality of the hearing is diminished."[22] Roddy Dunlop KC, a renowned Scottish litigator, presented another memorable critique,

19. *See* Robertson & Shammas, *supra* note 2, at 116, 122–26.

20. *See* Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG L. (May 18, 2023, 2:45 AM), https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end (discussing how "Alaska, Arizona, Illinois, Minnesota, Maryland, Michigan, North Carolina, and Texas have all integrated remote operations into their state courts' permanent playbooks. Some states have made civil non-evidentiary hearings largely remote, and others have extended that to procedural criminal hearings as well"); *see also* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1912–19 (2021) (discussing the development of long-term policies regarding remote court); Anne Sanders, *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*, 12 INT'L J. CT. ADMIN. 1, 18 (2020) ("In some countries, e.g., Norway and the UK, video-hearings are seen as an important tool for the judiciary not only in the pandemic but also in the future."). *See generally* Wei-min Zuo (左为民), *Online Litigation in the Post-Epidemic Era: Where to Go* (后疫情时代的在线诉讼:路向何方), 43 MOD. L. SCI. 35 (现代法学) (China) (2021) (discussing how the prospect of online litigation development in China post-pandemic should be guided by the needs of judicial practitioners, always upholding a positive and prudent attitude, and making steady progress). Separately, it is important to note that COVID-19 itself is far from over. In fact, the U.S. is still experiencing high transmission rates. Dr. Michael Hoerger at Tulane University tracks COVID-19 cases and releases weekly reports and data. *See* Michael Hoerger, *Pandemic Mitigation Collaborative*, PANDEMIC MITIGATION COLLABORATIVE, https://pmc19.com/ (last visited Feb. 28, 2025).

21. RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE 143–44 (2019).

22. *See* Kapil Summan, *Asynchronous Legal Hearings and Pandemic Fatigue Discussed at Civil Justice Conference*, SCOTTISH LEGAL NEWS (June 22, 2021), https://www.scottishlegal.com/articles/asynchronous-legal-hearings-and-pandemic-fatigue-discussed-at-civil-justice-conference.

stating that "there is a real difficulty that 'working from home' is morphing into 'living at work' [for lawyers participating in asynchronous trials]."[23]

This heated debate hints at the pros and cons of asynchronous trials.[24] Potential advantages include (1) freedom from time and space constraints, (2) expanded access to justice,[25] (3) improved efficiency because trial judges could administrate multiple trials at the same time,[26] (4) lower legal fees, (5) more opportunities to incorporate AI and other new technologies into the proceedings, and (6) the ability to record the whole process to preserve a more complete record.[27] Potential disadvantages include (1) lessened solemnity, (2) the inability to observe the demeanor of witnesses and parties in real time, (3) more difficulties in conducting cross-examinations, (4) participants' potential lack of Internet connectivity, necessary hardware and software, or necessary technical skills, (5) a lack of focus compared to in-person synchronous trials, and (6) cultural or social loss, including the absence of key memorable moments such as the jury verdict.

This Article predicts that asynchronous trials will play an important role in future dispute resolution, not just because they are a logical progression of both the turn to virtual courthouse spaces and the judicial system's existing asynchronous elements but also because the asynchronous trial's pros outweigh its cons. Ultimately, asynchronous trials would complement the many options our modern-day "multi-door courthouse"

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23. *Id.*

24. For a detailed discussion of the pros and cons of asynchronous trials, see *infra* Part III.

25. *See, e.g.*, Avital Mentovich, J.J. Prescott, & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 975 (2020). This study revealed that outcome disparities that exist in traditional traffic proceedings—especially people of color and young people incurring higher fines—were eliminated with the shift to online proceedings where their racial identity was unknown and their age was less conspicuous. These findings could be attributed to the elimination of implicit bias in judicial decision-making, a phenomenon that courts have been trying to address effectively for some time. But the study also concluded that the elimination of outcome disparities in this case could stem from the reduction of "structural biases"; that is, members of disadvantaged groups could benefit from the shift from real-time courtroom communication before an authority figure to *remote, asynchronous communication* because it gives all parties time to contemplate their next steps and consult with others while communicating from the comfort of their home.

26. *See, e.g.*, *As Pandemic Lingers, Courts Lean Into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/data-news/judiciary-news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology ("'I think [remote trial] worked just as well as in person,' said U.S. District Judge Indira Talwani, of the District of Massachusetts . . . . 'The convenience of not having to travel here was enormous. Absolutely it was an effective way to deliver justice.' . . . 'It flowed seamlessly from jury selection through deliberations,' said Judge Mary S. Scriven, of the Middle District of Florida, who presided over a five-day all-video civil trial in late January. 'I would do it again in a heartbeat. There were no more glitches than are typically seen in an in-person trial.'").

27. Recording a trial might be beneficial for accuracy and completeness of the record on appeal. *But cf.* Frederick K. Grittner, *The Record on Appeal: Minnesota's Experience with Videotaped Proceedings*, 19 WM. MITCHELL L. REV. 593, 602–05 (1993). Grittner analyzes a 1989–1991 experiment in which trials were recorded and the videotapes were then watched at the appellate level; the results showed that appellate attorneys were frustrated with the length of the recordings and preferred written transcripts. *Id.* That said, this thirty-year-old article acknowledges how future advances in technology might remedy these frustrations, and attorneys of today might be able to utilize tools like AI and time stamps to avoid sitting through a six-hour-long video trial.

offers.[28] It is essential, then, to define the appropriate scope of asynchronous trials and consider how to design suitable procedural and evidentiary rules for them.

Regarding the scope of asynchronous trials' application, two key limitations should be in place. First, as has been the case with pilot programs in U.S. states and in other countries, asynchronous trials should be used for high-volume civil adjudication, which refers to small claims that typically involve pro se litigants and are generally of low complexity.[29] This focus maximizes the advantages of asynchronous trials while minimizing their shortcomings and implementation difficulties.[30] Second, asynchronous trials should not be mandatory, even for civil cases that fall within this scope; instead, it should be an option available to the parties.[31]

There are four reasons for at least initially limiting the scope of asynchronous trials. The first two reasons play to its advantages, while the latter two allow for its limitations. First, because asynchronous trials would allow a single judge to preside over multiple trials at once, they could significantly boost the judge's work efficiency when dealing with the high volume of cases commonly found in civil small claims. Second, an asynchronous trial would give litigants ample time to contemplate their next steps, research legal terms and rules that they do not understand and consult with others as needed—all luxuries lacking in synchronous trials. Asynchronous trials would therefore be more friendly to pro se litigants than traditional trials.[32] Third, because asynchronous trials are likely to

28. The birth of modern alternative dispute resolution (ADR) in the legal system is commonly pegged at 1976, during a conference organized by U.S. Supreme Court Chief Justice Warren Burger. The highlight of the conference was a presentation by a Harvard law professor, Frank E.A. Sander, calling for courts to use other methods of dispute resolution besides trials. Frank E.A. Sander, Professor of L., Harv. Univ., Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *reprinted in* Sander, F. E. A., *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). While Professor Sander did not use the words, the speech has come to be known as "the multi-door courthouse speech," and it is widely credited for kicking off the modern ADR movement. *See, e.g.*, LEONARD L. RISKIN, CHRIS GUTHRIE, RICHARD C. REUBEN, JENNIFER K. ROBBENNOLT, NANCY A. WELSH, & ART HINSHAW, DISPUTE RESOLUTION AND LAWYERS: A CONTEMPORARY APPROACH 27 (6th ed. 2019); *see also* Orna Rabinovich-Einy, *Process Pluralism in the Post-Covid Dispute Resolution Landscape*, 10 TEX. A&M L. REV. 55, 61–63 (2022).

29. *See High-Volume Civil Adjudication*, AM. L. INST., https://www.ali.org/project/high-volume-civil-adjudication (last visited Jan. 24, 2025) ("These types of claims, which arise in such areas as debt collection, evictions, home foreclosure, and child support, comprise a significant proportion of state court cases and are shaping the lives of millions of Americans, particularly women and people of color.").

30. *See* Sup. Ct. of Fla., *supra* note 4 (e.g., Florida judicial circuits can use ODR for civil traffic incidents, small claims under $1,000 dollars, and dissolution of marriage in cases that do not involve children).

31. This is largely due to the Seventh Amendment of the U.S. Constitution, which protects the right of citizens to have a (traditional) jury trial for civil cases in which the claim exceeds a certain dollar value. *Constitutional Amendment—Amendment 7—"The Right to Jury Trial in Civil Affairs,"* NAT'L ARCHIVES, https://www.reaganlibrary.gov/constitutional-amendments-amendment-7-right-jury-trial-civil-affairs (last visited Feb. 28, 2025). Also, certain types of small claims are simply not suitable for asynchronous trials. For example, a dispute over the existence and terms of an oral contract may have little reliable documentary corroboration for either side. These cases often boil down to swearing contests, which are more suitable to the traditional synchronous trial. See *infra* Section IV.A for a detailed discussion on this point.

32. *See* Mentovich, Prescott, & Rabinovich-Einy, *supra* note 25, at 915–16.

rely heavily on text-based communication (instead of video conferences, which require synchronous scheduling), they are best suited for low-complexity cases. The more complicated the subject matter, the less efficient it is to use written text to describe it—and the less well-suited the asynchronous trial becomes. Similarly, because the constitutional hurdles in criminal cases (e.g., the Confrontation Clause and the Speedy Trial Clause) are either insurmountable or would unnecessarily complicate the situation, these cases are better excluded for now.[33] Finally, while asynchronous jury trials are not impossible, they would pose significant challenges at this early stage of asynchronous trial development. Therefore, given defendants' constitutional right to a jury trial, asynchronous trials should always be an option rather than a requirement.

The need for procedural and evidentiary rules to govern asynchronous trials presents an exciting opportunity: the chance to rethink centuries-old civil procedural and evidentiary rules in the age of the Internet.[34] Given the features of asynchronous trials, some key areas for rulemaking include (1) efficient time usage (e.g., a time limit for sending entries), (2) proportionality (e.g., a word limit for entries and a file size limit for attachments), (3) evidence editing (including entry-undo rules), (4) authentication and identity protection (e.g., face and voice identification), (5) data preservation and display (e.g., using blockchain technology to prevent input information from being tampered with), (6) evidence examination (e.g., asynchronous direct and cross examine witnesses), and (7) hybrid trial modes (including procedures that combine synchronous and asynchronous practices).[35] Well-designed case management procedures and evidentiary rules would address or even alleviate concerns about asynchronicity's potential disadvantages, such as an inability to react in real time and a loss of solemnity.

It is time to take the concept of asynchronous trials seriously. This Article does so first by systematically collecting and analyzing information on the development of asynchronous trial programs in U.S. states and internationally. By parsing the scant judicial writings on the concept, this Article pieces together a panoramic view of the asynchronous trial that could help researchers better understand its nature and better project its future development. Legal scholars have fallen behind the judicial branch and technology sectors when it comes to exploring asynchronous trials.[36]

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33. Once there is enough empirical data accumulated regarding civil asynchronous trials, then we could assess the feasibility and desirability of criminal asynchronous trials, starting with petty crimes that are punishable by only a fine rather than any jail time. For a detailed discussion, see *infra* Section IV.A.

34. *See* Rule, *supra* note 11, at 278 ("What we need is a justice system that works the way the Internet works.").

35. For a detailed discussion, see *infra* Sections IV.B and IV.C.

36. So far, only one law review article has introduced asynchronous online courts from a comparative law perspective (focusing on Canada, China, Singapore, and the United Kingdom). *See* Xi, *supra* note 10. However, it neither focuses on asynchronous trials nor discusses the situation in the

This Article fills the gap in the literature by developing a theoretical framework to study and develop asynchronous trials, laying a foundation for further research. One next step could be to expand the analysis to all kinds of asynchronous dispute resolutions, including various alternative dispute resolutions (negotiation, mediation, arbitration, and online dispute resolution (ODR)), administrative hearings, and pretrial and posttrial stages of legal proceedings. Because the trial is at the center of the dispute resolution universe, any milestone achieved in the development of asynchronous trials will have a gravitational impact on these other processes.[37]

This Article proceeds as follows: Part I discusses the United States legal context, including the U.S. tradition of synchronous trials, modern asynchronous aspects of civil proceedings, and post-COVID-19 developments. Part II shifts to comparative foreign examples, including an analysis of the continental law countries' asynchronous traditions—such as an episodic style of proceeding and preference for written evidence—and an introduction to pioneering asynchronous court programs in Canada and Singapore. Part III elaborates on the potential pros and cons of asynchronous trials. Finally, Part IV considers the suitable scope for asynchronous trials and the appropriate design of procedural and evidentiary rules, raising new ideas for rulemaking on this subject.

I. ASYNCHRONOUS TRIALS IN THE UNITED STATES

The concept of asynchronous trials challenges the deeply entrenched traditions of the American legal system, which has long been characterized by its synchronous, real-time nature. Because the American legal system is grounded in centuries of common law, features such as concentrated trials, the right to confrontation, and live witness testimony have been central to the courtroom experience and reflect the immediacy and dynamism of live adjudication. However, the rise of modern technology and the disruptions caused by the COVID-19 pandemic have opened the door to new possibilities for asynchronous proceedings. By decoupling the temporal and spatial constraints of traditional trials, asynchronous methods offer innovative solutions to improve efficiency, access, and adaptability in the

United States. On the other hand, numerous legal academic works have considered ODR, which often has asynchronous aspects. *See, e.g.*, Mentovich, Prescott, & Rabinovich-Einy, *supra* note 25, at 975; Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 211 (2016); Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 344–52 (2016); Karolina Mania, *Online Dispute Resolution: The Future of Justice*, 1 INT'L COMPAR. JURIS. 76, 77–79 (2015); Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution As an Alternative to Cost Intensive Litigation*, 27 JOHN MARSHALL J. COMPUT. & INFO. L. 81, 85–90 (2009).

37. However, not all legal scholars agree that the trial is the center of the universe of dispute resolution. Some have argued that the pretrial phase is now the center of gravity in the judicial system. *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 84 (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004); John W. Cooley, *Puncturing Three Myths About Litigation*, 70 A.B.A. J. 75, 76 (1984) (noting how a litigant's case is "on trial" during the pretrial stage, and that stage rarely leads to a final formal trial).

legal process. This Part examines the historical foundations of American synchronous trials, explores the modern asynchronous adaptations in the last century, and analyzes recent developments in asynchronous trials, including pilot programs that have begun to reshape the landscape of civil adjudication in the United States.

A. Traditional Synchronicity

In the U.S. legal system, across federal and state courtrooms alike, the asynchronous trial is an unconventional concept. Most U.S. trials are synchronous, a reflection of the fact that the American courtroom has worked like live theater for centuries.[38] After months of pretrial pleadings, motions, discovery, and preparation, which one could call the "rehearsal" period, the prosecution (or plaintiff) and the defendant finally face off at trial. After the bailiff announces "all rise," the courtroom characters—including the presiding judge, attorneys, plaintiff, defendant, witnesses, court clerks, reporters, and jurors—all quickly get into their roles. For the rest of the day,[39] they perform together on the courtroom stage for a dynamic and climactic factfinding event. The parties, their lawyers, and the witnesses advance the defendant's guilt or innocence (or liability in civil cases); the presiding judge maintains order and interprets the law; and the jurors have front-row seats to "see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects."[40] All of this happens synchronously. Three features of the common law system lie behind this deep-rooted tradition of synchronicity: the concentrated trial, the right to confront witnesses, and live witness testimony.

1. Concentrated Trial

One fundamental impediment preventing American trials from turning asynchronous is the Anglo-American tradition of a concentrated trial.[41] In short, lawsuits tend to be adjudicated in a single instance, and proof-taking is concentrated into a "day-in-court" trial.[42] This tradition starkly

38. *See* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 573 (2008); *see also* Peter W. Murphy, *"There's No Business Like . . . ?" Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111, 111 (2002) (arguing that "there is undeniably a close relationship between" a courtroom and a theater).

39. According to a research project sponsored by the National Institute of Justice, the median length for civil trials ranged from 10 to 30 hours, and the median length for criminal trials ranged from 6.5 to more than 23 hours. Some of the variation in trial length results from the nature of a court's trial caseload and the way it selects and examines jury members. *See* Dale Anne Sipes, *The Lengths Courts Go to Try a Case and Possible Remedies*, 12 STATE CT. J. 4, 5 (1988).

40. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 35 (1986) (quoting Andrew Hamilton, defense counsel to John Peter Zenger in Zenger's trial for seditious libel in 1735).

41. *See* Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 418–19 (1960). *But cf.* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 862–63 (1985).

42. *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 59 (1997); *see also* Roger C. Park, *An Outsider's View of Common Law Evidence*, 96 MICH. L. REV. 1486, 1487 (1998) (reviewing MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997)).

contrasts with the continental style, in which proceedings such as evidentiary hearings take place in widely separated episodic sessions.[43]

So why has the common law system traditionally required concentrated trials? One reason is that the jury trial—another common law tradition—makes discontinuous trials impractical.[44] As John Langbein stated, "[h]istorically, it is surely correct that concentration of the trial eliminated the problems of reassembling and controlling groups of laymen across long intervals, problems that would otherwise have bedeviled a system of routine but discontinuous jury trial."[45] This common law tradition remains paramount even in bench trials, in which the judge acts as factfinder instead of a jury.[46] "We tend toward concentrated trial even when the judge sits alone," Benjamin Kaplan explains, "perhaps by magnetic attraction to jury trial as the historic centerpiece of civil procedure, perhaps because the system puts a high value on the trier's fresh impression of live proof, perhaps for other reasons."[47]

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43. DAMAŠKA, *supra* note 42, at 59–60; *see also* Benjamin Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 841 (1971) ("What then is the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the German, the Italian, and others in the civil-law family? I think it is the single-episode trial as contrasted with discontinuous or staggered proof-taking."); Langbein, *supra* note 41, at 827 n.9 ("The whole procedure up to judgment may therefore be viewed as being essentially a series of oral conferences."). But note, in many civil law countries, at least some of the episodes themselves are synchronous, with all the major participants in the same place at the same time. John Langbein once illustrated how judicial factfinding works in this episodic fashion:

> Suppose that the [German] court has before it a contract case that involves complicated factual or legal issues about whether the contract was formed, and if so, what its precise terms were. But suppose further that the court quickly recognizes (or is led by submission of counsel to recognize) that some factual investigation might establish an affirmative defense—illegality, let us say—that would vitiate the contract. Because the court functions without sequence rules, it can postpone any consideration of issues that we would think of as the plaintiff's case—here the questions concerning the formation and the terms of the contract. Instead, the court can concentrate the entire initial inquiry on what we would regard as a defense. If, in my example, the court were to unearth enough evidence to allow it to conclude that the contract was illegal, no investigation would ever be done on the issues of formation and terms. A defensive issue that could only surface in Anglo-American procedure following full pretrial and trial ventilation of the whole of the plaintiff's case can be brought to the fore in German procedure.

Id. at 830.

44. Langbein, *supra* note 41, at 863–64 (citing Arthur Taylor von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, *in* 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART 364 (Norbert Horn ed., 1982)).

45. Langbein, *supra* note 41, at 864; *see also* Kaplan, *supra* note 41, at 419 ("With us in this country jury trial must be carried out as a single continuous drama, for a jury cannot be assembled, dismissed and reconvened over a period of time.").

46. *See* Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1020 (1998).

47. Kaplan, *supra* note 41, at 419. As for the "other reasons" that Kaplan references, we can point to criminal defendants' Sixth Amendment right to a speedy trial as one factor. A speedy trial is considered a fundamental liberty designed to prevent prolonged and oppressive pretrial incarceration, to minimize the anxiety and burden associated with public prosecution, and to ensure that the passage of time does not impair the accused's ability to obtain a fair trial (no undue delay). *See* United States v. Ewell, 383 U.S. 116, 120 (1966). Such an important notion also permeates and influences American civil trials.

Admittedly, it is easier to realize the goals of concentrated trials in a synchronous mode than in an asynchronous one. However, a concentrated trial does not need to equal a synchronous trial; the concentrated trial and the asynchronous mode are not necessarily incompatible. Through well-designed case management procedures, concentrated asynchronous proof-taking can reasonably compare to a "day-in-court" trial experience, especially for simple small claims cases.[48]

2. Confrontation

A second long-standing common law tradition that complicates the possibility of asynchronous trials in the United States is that persons accused of a crime are guaranteed the right to confront their accusers face-to-face during a trial.[49] This right is guaranteed in the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[50] This constitutional right only applies to criminal prosecutions, not civil cases or other proceedings.[51] Nonetheless, the right to cross-examination—which facilitates the process of confrontation—plays an essential role in civil trials as well.[52]

It is the "face-to-face" element of the confrontation tradition that has demanded that trials be conducted in a synchronous manner. Nonetheless, if we shift focus from the tradition of confrontation to the goal of effective cross-examination[53] facilitated by well-designed procedure and evidence rules, it is feasible that asynchronous trials could be successfully implemented.[54] Also, limiting the scope of application of asynchronous trials to

48. *See* discussion *infra* Section IV.B.

49. The Confrontation Clause also has roots in Roman law. In noting the right's long history, the U.S. Supreme Court in *Coy v. Iowa* cited Acts of the Apostles 25:16, which reports the Roman governor Porcius Festus discussing the proper treatment of his prisoner Paul: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges." *See* Coy v. Iowa, 487 U.S. 1012, 1015–16 (1988). This passage is also cited in Shakespeare's *Richard II*, Blackstone's treatises, and various statutes. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 140–41 (1999) (Breyer, J., concurring).

50. U.S. CONST. amend. VI; *see* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998) (arguing that "confrontation is much more than this 'face-to-face' right. It also comprehends the right to have witnesses give their testimony under oath and to subject them to cross-examination. Indeed, the Supreme Court has treated the accused's right to be brought 'face-to-face' with the witness as secondary to his right of cross-examination.").

51. The Fourteenth Amendment makes the right to confrontation applicable to the states and not just the federal government. *See* U.S. CONST. amend XIV, § 1.

52. *See* FED. R. EVID. 611(b). "Scope of Cross-Examination," applied in both civil and criminal trials, states "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility." *See also* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chabourn ed., 1974) (Cross-examination is "the greatest legal engine ever invented for the discovery of truth.").

53. Generally, having the opportunity to cross-examine a witness at trial will satisfy the Confrontation Clause's guarantee. And trial courts are given "broad discretion . . . to preclude repetitive and unduly harassing interrogation." Davis v. Alaska, 415 U.S. 308, 316 (1974). The Supreme Court of the United States has emphasized that the "Confrontation Clause guarantees an opportunity for *effective* cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis added).

54. *See* discussion *infra* Sections IV.B–C.

civil small claims removes the burden to comply with the Sixth Amendment.

3. Live Witness Testimony

Just as texting is the most convenient way to communicate asynchronously, written evidence is ideal for asynchronous trials because it is easy to preserve and transmit. Additionally, and most importantly, the content of written evidence is fixed in that it has already been written down (in contrast with live witness testimony, which is situational and sometimes unpredictable). However, the common law tradition has gone in the opposite direction, demonstrating a strong preference for live witness testimony.[55] A typical American trial is essentially a concentrated show of witnesses being direct- and cross-examined as they describe their personal observations, provide character assessments, offer scientific explanations, and sometimes narrate their own stories.[56] Indeed, even when there is documentary or physical evidence, parties almost always still rely on live witness testimony to authenticate and describe the evidence.[57] Another reflection of the common law system's preference for live witness testimony is the hearsay rule, which greatly increases the difficulty of presenting written evidence at trial[58] and thus encourages parties to present live witness testimony instead.[59]

This common law tradition may appear to be entrenched and unchallengeable, but if the ultimate goal is accurate and efficient factfinding, we should interrogate whether the rationale behind the live-witness-testimony fever aligns with that goal. One oft-cited explanation of how live testimony promotes accuracy is that the factfinder can better assess a witness's truthfulness by closely observing the witness's demeanor while they are on the stand.[60] Studies have shown, however, that people's abilities in this sphere are much weaker than they think.[61] Moreover, written evidence

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55. *See* DAMAŠKA, *supra* note 42, at 69; *see also* Edward K. Cheng, *Thinking Beyond the Federal Rules*, 23 EVID. SCI. (China) 632, 638–39 (2015).

56. *See* FED. R. EVID. 607–609, 701–704.

57. *See* Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1077 (2019) ("Documentary or physical evidence rarely stands on its own.").

58. Written evidence falls under the definition of "hearsay" (an out-of-court statement offered into evidence to prove the truth of the matter asserted); according to the general hearsay rule, hearsay is not admissible except in the case of an exception or exemption. *See* FED. R. EVID. 801–02.

59. *See* Cheng, *supra* note 55, at 639; Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 797 (1992) ("The hearsay rule encouraged trials to be joined upon evidence presented by the parties in open court through witnesses testifying from present memory to first-hand knowledge, and thus available to be tested through cross-examination.").

60. James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 904 (2000) ("To fully judge the witness's testimony, the factfinder must see and hear the witness's demeanor.").

61. *See* Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA. L. REV. 1047, 1055 (2011) (giving a classic example reflecting on the inferential complexity at trial):

> Demeanor is not just demeanor; it is instead a complex set of variables. Is the witness sweating or twitching, and if so is it through innocent nerves, the pressure of prevarication,

may actually be more reliable than live witness testimony because it is often recorded when "perception and memory [are] still fresh, comprehensive and clear," before the witness experiences external influences and "self-concerns"[62] such as fear of reprisal.[63] After centuries of synchronous trials and live witness testimony dominating American courtrooms, it is time to experiment with asynchronous trials and increase judicial confidence in the reliability of written evidence. This does not mean fully replacing the synchronous model with the asynchronous one; it simply means being open to change. Just as today's texting-hooked teenagers still make phone calls when needed, a well-designed asynchronous trial system could feasibly switch into real-time oral testimony when necessary.[64]

B. Modern Asynchronous Aspects of Civil Proceedings

Most civil procedure in the United States, except for the trial itself, is already asynchronous.[65] At the beginning of a lawsuit, parties file written pleadings that are then delivered to the other party.[66] If the complaint survives a motion to dismiss at the initial stage of pleadings, then the case moves to discovery. Four major discovery tools—requests for production

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> a medical problem, or simply a distasteful habit picked up during a regrettable childhood? Does body language suggest truthfulness or evasion; is slouching evidence of lying or comfort in telling a straightforward story? Does the witness look the examiner straight in the eye, and if so is it evidence of commendable character or the confidence of an accomplished snake oil salesman? Does the voice inflection suggest the rectitude of the righteous or is it strained, and does a strained voice indicate fabrication or concern over the outcome of the case?

(citing Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 625–26 (1994)); *see also* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 12 (2012) ("[E]xperiments have revealed that jurors are blind to . . . factors that affect the accuracy of hearsay.").

62. "Self-concerns" refer to personal motivations, fears, or considerations that can influence an individual's behavior, statements, or memory. These concerns can lead witnesses to alter their testimony, consciously or unconsciously, in ways that may compromise the accuracy or reliability of their statements. *See Witness Intimidation: Challenges and Responses*, CRIM. JUST., https://criminal-justice.iresearchnet.com/criminal-justice-process/witness-protection-and-management/witness-intimidation-challenges-and-responses/ (last visited Feb. 18, 2025); Zhuhao Wang & David R. A. Caruso, *Is an Oral-Evidence Based Criminal Trial Possible in China?*, 21 INT'L. J. EVID. & PROOF 52, 63 (2017).

63. *See* Wang & Caruso, *supra* note 62, at 63.

64. *See* discussion *infra* Section IV.B.3.

65. Because this Article is mainly about asynchronous civil trials, the discussion in this Section focuses on civil proceedings.

66. When waiving service, "[t]he notice and request must . . . be in writing[,] . . . give the defendant a reasonable time of at least 30 days . . . to return the waiver[,] . . . and be sent by first-class mail or other reliable means." *See* FED. R. CIV. P. 4(d)(1). FED. R. CIV. P. 5(a)(1) requires the service of "a written motion" and "a written notice, appearance, demand, or offer of judgment, or any similar paper." *See* FED. R. CIV. P. 5(a)(1). Also, the defendant generally has twenty-one days to file an answer after being served with a written complaint. *See* FED. R. CIV. P. 12(a)(1)(A)(i). If the defendant has waived timely service, the defendant instead has sixty days to file an answer or ninety days if the defendant is "outside any judicial district of the United States." *See* FED. R. CIV. P. 12(a)(1)(A)(ii). The defendant has another twenty-one days to amend their answer as a matter of course after serving it. *See* FED. R. CIV. P. 15(a)(1)(A).

of documents,[67] interrogatories,[68] depositions by written questions,[69] and requests for admission[70]—involve the asynchronous collection and exchange of information between parties. When the parties encounter a contested issue at any pretrial stage, either side might file a written motion asking the judge to decide the issue asynchronously.[71] After discovery but before trial, if the parties no longer have a genuine dispute as to any material fact, then the judge's asynchronous ruling on a party's summary judgment motion tends to resolve the case.[72] Even most components of an appeal, except for oral arguments,[73] are asynchronous written communications between the parties and the appellate court.[74] "A litigant who loses in a federal court of appeals, or in the highest court of a state, may file a [written certiorari petition] asking the Supreme Court to review the case."[75]

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67. A request for production of documents is a written list of documents, electronic files, audio and video recordings, or physical things that a party submits to their adversary asking to inspect and copy the requested items and those that have relevance to the issues of the lawsuit. *See* FED. R. CIV. P. 34(a). The party to whom the request is directed has thirty days to serve a response. *See* FED. R. CIV. P. 34(b)(2)(A).

68. An interrogatory is a list of written questions one party sends to another. *See* FED. R. CIV. P. 33(a). The recipient has up to thirty days to serve their answers and any objections in writing under oath and according to the case's schedule. *See* FED. R. CIV. P. 33(b)(2)–(3).

69. *See* FED. R. CIV. P. 31 (rule authorizing depositions to be taken using written questions rather than oral testimony). During a deposition by written questions, an authorized deposition officer (typically, a court reporter) reads the questions to the witness and then records the witness's answer. *See id.*; *see also Deposition*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/deposition (last visited Jan. 20, 2025) (In general, "[a] deposition is a witness's sworn out of court testimony." Specifically, an oral deposition is one of the very few synchronous discovery events, in which "the deponent, attorneys for the interested parties, and a person qualified to administer oaths" meet together to do live deposition.). In practice, oral depositions are far more popular than depositions by written questions. One commentator notes that written depositions are generally disfavored due to the risk of coaching (despite the unethical nature of this behavior) and the inability to immediately follow up on a witness's answer that might reveal a new line of inquiry. *See generally* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2113 (3d ed. 2024).

70. *See* FED. R. CIV. P. 36(a) (demonstrating that a request for admission is a discovery device that allows one party to request that another party asynchronously admit or deny the truth of a statement under oath; the party to whom the request is directed has up to thirty days to submit to the requesting party a written answer or objection). If admitted, the statement is considered to be true for all purposes of the current trial. *See* FED. R. CIV. P. 36(b).

71. FED. R. CIV. P. 7(b)(1)(A) ("The motion must . . . be in writing unless made during a hearing or trial . . . .").

72. FED. R. CIV. P. 56(a).

73. However, oral argument is not granted in every appeal case. In federal appellate courts, "[m]ore than 80 percent of federal appeals are decided solely on the basis of written briefs." *See Appellate Courts and Cases—Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/data-news/reports/handbooks-manuals/journalists-guide-federal-courts/appellate-courts-and-cases-journalists-guide (last visited Jan. 20, 2025). In Florida, "[t]he First, Second, Third, Fourth, and Fifth District Courts of Appeal often, but not always, grant timely requests for oral argument in cases involving most final orders." *See Oral Argument in Florida's Appellate Courts and Florida's Supreme Court*, PRO SE HANDBOOK, https://prose.flabarappellate.org/chapter-18-oral-argument-in-floridas-appellate-courts-and-floridas-supreme-court (last visited Feb. 18, 2025). The Florida Supreme Court, in contrast, grants oral argument far less often. *See also id.* (stating that "[i]f oral argument is requested and granted, it is held after all the parties have" asynchronously filed their initial brief, answer, and written reply briefs).

74. *See* FED. R. APP. P. 25(a)(1), (b).

75. *Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/appeals (last visited Jan. 20, 2025).

Some of these asynchronous procedures are inherited from the common law tradition; others are products of the twentieth-century development of modern American civil procedure. It is widely recognized that the 1938 establishment of the Federal Rules of Civil Procedure (FRCP) modernized American civil proceedings.[76] Over the years, the FRCP and the U.S. Supreme Court have shaped and gradually refined the effectiveness, scope, and framework of these asynchronous procedures.

One example of how asynchronous proceedings have improved significantly in the last century is discovery, the formal pretrial process through which each party in a civil lawsuit acquires evidence about the case from the opposing party and witnesses.[77] As Stephen Yeazell states, "[o]ne hundred years ago, litigants had a limited range of discovery devices that could be used only against some persons, and only in some kinds of actions. Discovery was not always a matter of right, and, as a result, litigants were often surprised by evidence produced at trial."[78] The FRCP created the first comprehensive discovery system in U.S. federal courts[79] and defined multiple tools that parties can use to unearth information during the discovery stage.[80] In addition, recent amendments to the FRCP added the concept of "electronically stored information" (ESI),[81] the modern expression of asynchronous communications, "into the law of discovery and put it on an equal footing with the old concept of a 'document.'"[82] Discovery has become a cultural icon of American civil litigation; it is the

76. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987) ("The 1938 Federal Rules were heralded as a phenomenal success.").

77. *See Pretrial Discovery*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/pretrial_discovery (last visited Jan. 20, 2025) (providing the definition of pretrial discovery); *see also* STEPHEN C. YEAZELL, JOANNA C. SCHWARTZ, & MAUREEN CARROLL, CIVIL PROCEDURE 331 (11th ed. 2023) ("A hundred years ago, if a complaint survived a motion to dismiss, the case would go to trial if the plaintiff wanted it to. That is no longer true. In contemporary litigation the chief significance of a complaint's surviving dismissal is that it enables the plaintiff to reach an intermediate stage between pleading and trial[—discovery]. Today most lawsuits end at this stage . . . .").

78. YEAZELL, SCHWARTZ, & CARROLL, *supra* note 77, at 331.

79. The general scope of discovery is quite broad. *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . .").

80. In comparison, the United Kingdom—the birthplace of common law—has a much narrower scope of civil discovery, and the tools that parties can use during discovery to unearth information are much more limited. *See* FED. R. CIV. P. 30–36. For example, "in England and Wales there is no deposition process and no opportunity to cross-examine a witness on their evidence until they appear at trial." *See What US GCs Should Know About Evidence in English Litigation*, COOLEY (Sept. 21, 2016), https://www.cooley.com/news/insight/2016/2016-09-21-what-us-gcs-should-know-about-evidence-in-english-litigation.

81. *See* FED. R. CIV. P. 34(a)(1)(A) (defining Electronically Stored Information (ESI) broadly as any type of information stored in electronic form). Specifically, ESI is a category of discoverable information, encompassing "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained." *Id.*

82. Thomas W. Burt & Gregory S. McCurdy, *E-Discovery of Dynamic Data and Real-Time Communications: New Technology, Practical Facts, and Familiar Legal Principles*, 115 YALE L.J. POCKET PART 166, 167 (2006); *E-Discovery Update: Federal Rules of Civil Procedure Amendments Go into Effect*, MCGUIREWOODS (Dec. 1, 2015), https://www.mcguirewoods.com/client-resources/alerts/2015/12/e-discovery-update; *see also* FED. R. CIV. P. 26(b)(2)(B), 37(e).

focus of, rather than a mere step in, the adjudication process.[83] By some estimates, discovery accounts for fifty to ninety percent of the total costs of adjudicating a civil case.[84]

Modern asynchronous aspects of American civil proceedings have been a success. One indicator of that success is that nowadays, over 95% of lawsuits end in pretrial settlement.[85] Therefore, a shift to asynchronous trials for high-volume civil adjudication might not be as radical a change in litigants' experiences with the civil litigation system as it might seem at first blush.

C. Post-COVID-19 Developments

The COVID-19 pandemic forced courts to change the way they heard cases overnight. Traditional in-person trials could not continue during the pandemic because courts all over the country shut down.[86] To prevent "extreme backlogs and delays," American courts at all levels rapidly embraced new technologies and went virtual.[87] Suddenly, "[s]ending notice, submitting documents and evidence, holding trials, and receiving judgments could all be conducted online."[88] In this sense, the pandemic catalyzed courts' adoption of modern technology.[89]

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83. *See* Griffin B. Bell, Chilton Davis Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992); *see also* Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMPAR. L. 751, 817 (2003) ("American law provides the most extensive discovery rights in the world.").

84. Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 473 (2010) ("Discovery accounts for the majority of the cost of civil litigation—as much as ninety percent in complex cases, according to some estimates."); *see also* Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civ. Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Prac. and Proc. 4 (May 11, 1999), 192 F.R.D. 340, 357 (2000) ("[T]he cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed.").

85. *See What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, THE L. DICTIONARY, https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements (Aug. 30, 2022); *see also When to Litigate and When to Settle*, DENTON PETERSON DUNN, https://arizonabusinesslawyeraz.com/when-to-litigate-and-when-to-settle/ (last visited Feb. 17, 2025) ("Generally, less than 3% of civil cases reach a trial verdict. So, around 97% of cases are resolved by means other than trial.").

86. *COVID-19 Announcements*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/announcements/covid-19.aspx (last visited Feb. 17, 2025) (the U.S. Supreme Court closed the building "for the health and safety of the public and Supreme Court employees"); *see* Ariel Shapiro, *Supreme Court Suspends Hearings for First Time in a Century Due to Coronavirus*, FORBES, https://www.forbes.com/sites/arielshapiro/2020/03/16/supreme-court-suspends-hearings-for-first-time-in-a-century-due-to-coronavirus (Mar. 16, 2020, 11:48 AM).

87. *See* Robertson and Shammas, *supra* note 2, at 116–26; *see also* Rabinovich-Einy, *supra* note 28, at 62.

88. Xi, *supra* note 10, at 42.

89. *See* Rabinovich-Einy, *supra* note 28, at 62; Seth Rubinstein, *All Rise, All Mute: Online Court Proceedings, Coronavirus, and Access to Justice*, THE PETRIE-FLOM CTR. AT HARV. L. SCH., https://petrieflom.law.harvard.edu/2020/12/30/online-courts-pandemic-access-justice/ (last visited Feb. 18, 2025).

Crucially, this technology enabled judges to conduct hearings and trials online. The nation's first online trial amid COVID-19 was a bench trial held on April 22, 2020, over the Zoom videoconferencing platform. The one-day trial was overseen by a Harris County, Texas, judge[90] and attracted approximately two thousand viewers.[91] Less than a month later, a different Texas state court held the nation's first online jury trial.[92] Online trials and pretrial hearings quickly became the nation's new normal. For instance, during the height of the pandemic, California state courts were conducting around six thousand online hearings each day.[93]

Although virtual court frees lawsuit participants from needing to meet at a fixed location, it is still *synchronous* in nature. The parties, witnesses, judge, court clerks, and jury still need to meet in real time on a court-employed videoconferencing platform.[94]

Notably, although courts across the country have returned to normal in-person operations as the COVID-19 crisis has eased, the judiciary's use of technology has continued and shows no signs of slowing down. For example, some state courts have permanently adopted synchronous online hearings and began asynchronous pilot programs.

1. Synchronous Online Pretrial Hearings Earning a Permanent Spot in State Courts

Even though the COVID-19 pandemic has eased, state courts across the country continue to hold synchronous online pretrial hearings.[95]

90. *See* Daniel Siegal, *Texas Court Pioneers Trial by Zoom in Atty Fee Dispute*, LAW360 (Apr. 22, 2020, 10:05 PM), http://www.law360.com/articles/1265459/texas-court-pionners-trial-by-zoom-in-atty-fee-dispute.

91. *Id.*

92. *See* Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 12:14 PM), https://reut.rs/3hKVqCs.

93. *See* Blaine Corren, *Judicial Council to Work on Expanding Remote Access to Court Services*, CAL. CTS. NEWSROOM (Nov. 17, 2023), https://newsroom.courts.ca.gov/news/judicial-council-work-expanding-remote-access-court-services.

94. *See* Xi, *supra* note 10, at 46 ("Compared to traditional courts, online courts merely change the form of courtrooms (from physical to virtual) and how documents are submitted (from hard copy to electronic copy), and both courts function similarly in practice.").

95. *See* NAT'L CTR. FOR STATE CTS., REMOTE HEARINGS AND ACCESS TO JUSTICE: DURING COVID-19 AND BEYOND 1 (2020), https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf ("After the COVID-19 crisis, the use of technology for court appearances will very probably continue."); *see also* Jacqueline Thomsen, *Virtual Court Hearings Are Here to Stay Post-Pandemic, Survey Finds*, LAW.COM (Aug. 18, 2021, 9:00 AM), https://www.law.com/nationallawjournal/2021/08/18/virtual-court-hearings-are-here-to-stay-post-pandemic-survey-finds (the vast majority of judges and officials at state, municipal, and county courts in a new Thomson Reuters survey said they are still holding virtual proceedings).

Alaska,[96] Arizona,[97] Colorado,[98] Illinois,[99] Maryland,[100] Michigan,[101] Minnesota,[102] North Carolina,[103] and Texas,[104] among other states, have integrated remote operations into their state courts' permanent playbooks.[105] One main reason why online hearings remain in use is that disputants have simply become accustomed to them. Now, parties are beginning to demand even faster, cheaper, and more convenient resolution processes.[106] Judges and lawyers have also come to appreciate the benefits of online hearings.[107] Numerous national, state, and local post-COVID-19 surveys of the judicial branch, state bar members, and the public at large reported high levels of support for online hearings.[108] Besides convenience, other key considerations driving this change include increasing access to

96. *See* James Brooks, *Alaska Courts Consider Rules for Permanently Streaming Many Hearings Online*, KTOO (Mar. 9, 2023), https://www.ktoo.org/2023/03/09/alaska-courts-consider-rules-for-permanently-streaming-many-hearings-online.

97. *See* Ariz. Sup. Ct. Admin. Order, No. 2022-88, In the Matter of Adoption and Implementation of Plan B Workgroup Recommendations As Presumptive Standards for Remote and In-Person Hearings (Aug. 3, 2022), https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-88.pdf.

98. *See* Colo. Sup. Ct., C.J. Directive 23-02, Livestreaming Coverage of Criminal Court Proceedings in the Trial Courts (May 15, 2023).

99. *See* Marcia M. Meis, *Remote Court Proceedings Move into Next Phase*, ADMIN. OFF. OF THE ILL. CTS. (May 31, 2023), https://www.illinoiscourts.gov/News/1248/Remote-court-proceedings-move-into-next-phase/news-detail.

100. *See Remote Hearings and Proceedings*, MD. CTS., https://www.mdcourts.gov/remotehearings (last visited Feb. 18, 2025) ("Maryland Rules 21-101, *et. seq* authorize Circuit Courts to conduct remote electronic proceedings.").

101. Mich. Sup. Ct. Order, ADM File No. 2020-08 (July 26, 2021), https://www.courts.michigan.gov/4a5475/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2021-07-26_formattedorder_rescpandemicaos.pdf.

102. Minnesota was one of the first states, if not the first, to adopt standards governing the presumptive conduct of remote court hearings in trial courts, starting in 2021. *See* Minn. Sup. Ct., ADM20-8001, Order Governing the Continuing Operations of the Minnesota Judicial Branch (Apr. 19, 2022), https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/041922.pdf.

103. *See* Yanqi Xu, *NC Courts Expand In-Person Proceedings, But Online Options May Not Be Going Anywhere*, NC NEWSLINE (Mar. 17, 2021, 6:00 AM), https://ncnewsline.com/2021/03/17/nc-courts-expand-in-person-proceedings-but-online-options-may-not-be-going-anywhere.

104. *See Virtual Court*, TEX. L. HELP, https://texaslawhelp.org/article/virtual-court-0 (July 13, 2023).

105. *See* Reed, *supra* note 20.

106. *See* Rule, *supra* note 11, at 279.

107. *See* Brandon Moss, *Courts Continue to Embrace Remote Proceedings*, THOMSON REUTERS (Nov. 30, 2022), https://www.thomsonreuters.com/en-us/posts/news-and-media/courts-remote-proceedings ("Remote proceedings help limit litigation costs, by eliminating attorneys' travel time and any waiting time at the courthouse.").

108. *See* NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS—2023 POLL 12 (2023) ("Q: 'If you had business with the courts and this service was available online via videoconferencing . . . would you use it?'" The percent saying that they would definitely or probably use video to appear for a case before the court increased from 43% in 2014, to 52% in 2021, 59% in 2022, and 63% in 2023.); *see also* Samuel A. Thumma et al., *Post-Pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. REV. F. 1, 10–12 (2022).

justice,[109] fostering process pluralism,[110] and keeping up the momentum of the e-justice revolution.[111]

Nonetheless, the frantic enthusiasm surrounding virtual court has been cooling down. Courts, litigants, and lawyers now understand that online hearings are not a panacea[112] and only certain types of hearings are suitable for the virtual courtroom.[113]

2. Asynchronous Pilot Programs Emerging in State Courts

Virtual court is an evolving concept. When courts initially went virtual in response to the COVID-19 pandemic, they mainly transferred in-person trials and pretrial hearings to online videoconferencing platforms like Zoom and required parties to submit traditionally hard-copy documents and other physical evidence as electronic copies instead.[114] Despite now working from their homes instead of from their courtrooms, virtual court judges generally follow the same routine as they would in physical court.[115]

Asynchronous online courts, in contrast, are modified virtual courts that incorporate ODR technologies.[116] Similar to the first generation of virtual court, asynchronous proceedings are conducted remotely, allowing cases to be fully resolved without any participants appearing in a physical courtroom. Asynchronous online courts further incorporate new technologies and permit all participants to communicate mostly asynchronously via

109. *See* Corren, *supra* note 93 ("The input we heard in our listening sessions made it very clear that providing access to the courts through the use of remote technology is an access to justice issue. Individuals who face barriers to accessing their court proceedings in person, can effectively resolve those issues when they can appear remotely.").

110. *See* Rabinovich-Einy, *supra* note 28, at 57 ("[Process pluralism], as Menkel-Meadow has been telling us for many years, will enhance justice. '[O]ne size does not fit all,' she writes, and 'new forms of hybridity, variation and mixed processes may enhance human problem solving, increase creativity and flexibility in outcomes and dispute prevention, as well as resolution—and, hopefully, strengthen both peace and justice in their different forms.' Modern societies with all their diversity, she emphasizes, require pluralism and diversity in process.").

111. *See* Laura Spinney, *Zoom Trials and Kitten Lawyers: Inside the E-Justice Revolution*, THE NEW STATESMAN (Feb. 19, 2022), https://www.newstatesman.com/science-tech/2022/02/zoom-trials-and-kitten-lawyers-inside-the-e-justice-revolution.

112. *See* Reed, *supra* note 20 ("Despite the benefits of remote hearings, courts acknowledge they still present challenges that must be grappled with.").

113. *Id.* ("Nobody wants to try a complex felony case to a jury remotely because it's much too dynamic." (internal quotations omitted)).

114. *See* Xi, *supra* note 10, at 46–47.

115. *Id.* at 46 ("[B]oth [physical and online] courts function similarly in practice.").

116. *See Online Dispute Resolution*, WIKIPEDIA, https://en.wikipedia.org/wiki/Online_dispute_resolution (last visited Jan. 25, 2025) (Online dispute resolution (ODR) "uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation, or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process."); *see also* Rule, *supra* note 11, at 281. eBay's ODR platform is an early example of asynchronous dispute resolution. The e-commerce giant enabled users to present claims and negotiate asynchronously via automated systems. *See* Xi, *supra* note 10, at 51 ("It not only saves time for the users, as they can respond whenever and wherever they want within the specified period, but also facilitates dispute settlement since billions of disputes have been solved.").

a specially designed online portal.[117] This new model gives the parties more time to consider their responses and avoid overly emotional expression; this is distinctive from the virtual courts that emerged in the pandemic, which still mandate real-time communications. As the author of *Asynchronous Online Courts: The Future of Courts?*, Chen Xi, states, "[i]t not only saves time for the users, as they can respond *whenever and wherever* they want within the specified period, but also facilitates dispute settlement . . . . Thus, it is feasible for online courts to incorporate an asynchronous method of dispute resolution."[118]

U.S. courts have been slower than courts in several other jurisdictions in the world to embrace the asynchronous mode.[119] Nonetheless, pilot programs began emerging in some state courts prior to the onset of COVID-19 and accelerated significantly in the wake of the pandemic. These pilot programs have taken the form of either pretrial court-annexed ODR (negotiation, mediation, or a combination of the two) or asynchronous trials for small claims cases, such as landlord–tenant matters, contract matters, neighborhood disputes, traffic infractions, and marital disputes.[120] State-court projects in Utah, Michigan, and Florida are featured below.

a. Utah

In September 2018, Utah became the first U.S. state to launch an asynchronous, pretrial, court-annexed ODR messaging platform as a tool for settling civil small claims.[121] Since implementing ODR for small

117. For instance, by October 2021, the Matterhorn asynchronous platform (now a division of Catalis Courts & Land Records, LLC), developed by the University of Michigan Law School, had claimed to have facilitated the resolution of more than 40,000 small civil cases. *See* Jim Ash, *COVID-19 Pandemic Recovery Task Force Continues Work on Automated Platform for Resolving Small Civil Disputes*, THE FLA. BAR (Oct. 5, 2021), https://www.floridabar.org/the-florida-bar-news/covid-19-pandemic-recovery-task-force-continues-work-on-automated-platform-for-resolving-small-civil-disputes; *see also Modria Online Dispute Resolution*, TYLER TECHS., https://www.tylertech.com/Portals/0/OpenContent/Files/4080/Modria-Brochure.pdf (last visited Jan. 25, 2025); *Online Dispute Resolution Can Make Local Courts More Efficient*, PEW (June 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-can-make-local-courts-more-efficient ("[Matterhorn] helps reduce litigant confusion and fear, allows *asynchronous* scheduling to accommodate work and child care schedules, and offers a more reliable and easier-to-use means for litigants to make their voices heard." (emphasis added)).

118. Xi, *supra* note 10, at 51 (emphasis added).

119. For a detailed discussion on this point, see *infra* Section II.B.

120. The term "court-annexed" refers to services, programs, or platforms that are directly affiliated with and operated under the authority of a court. These programs are typically created, administered, or supervised by the court as part of its judicial processes. *See* ROBERT J. NIEMIC, DONNA STIENSTRA, & RANDALL E. RAVITZ, FED. JUD. CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 7–8 (2001). For example, court-annexed mediation involves mediation programs run by or associated with the court to help parties resolve disputes before proceeding to a formal trial. Similarly, court-annexed platforms are technological tools or systems designed and managed by the court to facilitate legal proceedings, such as online dispute resolution (ODR) systems integrated into a court's infrastructure. AMANDA R. WITWER, LYNN LANGTON, DUREN BANKS, DULANI WOODS, MICHAEL J. D. VERMEER, & BRIAN A. JACKSON, RAND CORP., ONLINE DISPUTE RESOLUTION 3 (2021), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA100/RRA108-9/RAND_RRA108-9.pdf.

121. *See* Zach Quaintance, *SXSW 2019: Utah, 'Pajama Court' and Resolving Cases Online*, GOVTECH (Mar. 11, 2019), https://www.govtech.com/civic/sxsw-2019-utah-pajama-court-and-

claims, Utah has seen a fast and sizable drop in default judgments among eligible small claim cases. Prior to the launch of this project, 71% of cases resulted in a default.[122] Now, that number is down to 53%, with officials noting that the majority of these defaults are related to debt collection.[123]

In Utah, ODR begins with online asynchronous communication between the parties. Both parties and the court-assigned facilitator[124] can see everything that is posted in the message portal. When one party posts a message, the other party receives an email or text message notification.[125] If the parties settle the claim, then they may ask the facilitator to prepare an online settlement agreement form for them to execute.[126] If the facilitator determines that the parties are unable to reach a settlement, then the facilitator terminates the asynchronous ODR process and notifies the court to set a traditional synchronous trial date.[127]

b. Michigan

Michigan's "MI-Resolve" system, which became active by July 2020, is one of the most robust asynchronous pretrial ODR programs in the United States.[128] As part of this system, the Michigan Supreme Court established and funds seventeen Community Dispute Resolution Program (CDRP) centers throughout the state.[129] The centers use volunteer mediators, who complete at least forty hours of training to facilitate party interactions using MI-Resolve.[130] In 2022, CDRP centers reported that they had managed 31,456 civil small claims cases in the past year, and about 67% of those cases settled.[131] Ninety-one percent of respondents in a recent MI-Resolve survey reported that they "agreed" or "strongly agreed" that

resolving-cases-online.html; *see also Small Claims ODR Volunteer Opportunity*, UTAH CTS., https://www.utcourts.gov/en/self-help/case-categories/consumer/small-claims/volunteer.html (last visited Jan. 25, 2025) (The Utah ODR pilot program covers small claims cases including disputes between landlords and tenants, homeowners and contractors, consumers and merchants, and roommates and neighbors. Cases also include insurance disputes, auto accidents, service and repair claims, and debts).

122. *See* Quaintance, *supra* note 121.

123. *Id.*

124. Facilitators in the Utah ODR system undergo intensive in-house training but are not formal court employees. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 10 & n.27.

125. *See Small Claims*, UTAH STATE CTS., https://www.utcourts.gov/en/self-help/case-categories/consumer/small-claims.html (last visited Mar. 1, 2025) (choose "Next Steps"; then choose "For ODR Cases").

126. Utah Sup. Ct., *supra* note 8, ¶ 7.

127. *Id.* ¶ 8.

128. *See* MICH. STATE JUST. INST., EVALUATION OF TWO STATEWIDE VIRTUAL DISPUTE RESOLUTION SERVICES IN MICHIGAN 2, 20 (2022).

129. *See id.* at ii.

130. *See id.* at 5.

131. *See* MICH. CTS., COMMUNITY DISPUTE RESOLUTION PROGRAM: ANNUAL REPORT 1 (2022), https://www.courts.michigan.gov/49ed63/siteassets/reports/odr/cdrp-annual-report-2022.pdf.

"MI-Resolve was convenient to address my issue."[132] Overall, 81% of clients who had used the MI-Resolve system said they would do so again.[133]

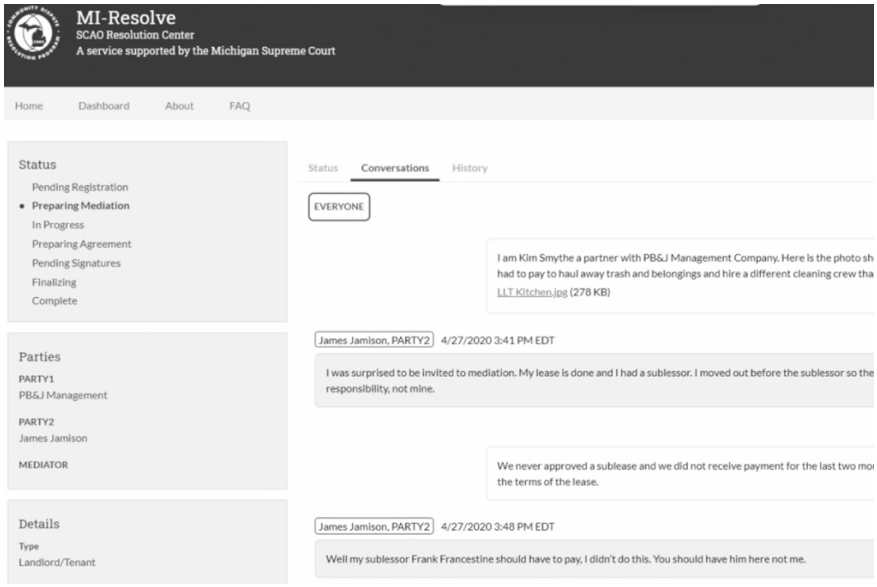

Diagram 1: The MI-Resolve system user interface: asynchronous communications between the parties.[134]

MI-Resolve is especially beneficial for people who are more comfortable communicating through text and people who do not want to see the other party face-to-face for various reasons.[135] To start a case on MI-Resolve, the party initiating the proceedings only needs to register, enter minimal information about the dispute, and provide the other party's name and email address.[136] Once the other party registers on the system, the court assigns a neutral, trained mediator to join the asynchronous conversation.[137] Through MI-Resolve, parties can upload photos, contracts, and other pieces of evidence and respond to the opposing side.[138] The mediator helps identify options for resolving the dispute and moves the conversation along. Once the parties have reached an agreement, the MI-Resolve system produces the necessary forms for review and filing in the local trial courts.[139] If the parties do not reach an agreement, then they

132. *See* Nikki Davidson, *Can Family Matters Be Mediated on a 24/7 Text Platform?*, GOVTECH (Oct. 5, 2023), https://www.govtech.com/biz/data/can-family-matters-be-mediated-on-a-24-7-text-platform.
133. *Id.*
134. A screenshot of the Michigan MI-Resolve's official demo video. *How to Use MI-Resolve*, MICH. CTS., https://www.courts.michigan.gov/4a9755/siteassets/videos/how-to-use-mi-resolve.mp4 (last visited Jan. 25, 2024).
135. *See* Davidson, *supra* note 132.
136. *How to Use MI-Resolve*, *supra* note 134.
137. *Id.*
138. *Id.*
139. *Id.*

retain their rights to resolve the issue through a traditional synchronous trial.[140]

c. Florida

Florida courts are currently piloting the nation's first asynchronous trials via a statewide judicial e-platform that can help pro se litigants resolve civil disputes of $1,000 or less.[141] Responding to recommendations from the Florida Bar's COVID-19 Pandemic Recovery Task Force, the Florida Supreme Court issued an administrative order on July 18, 2023, authorizing the state's judicial circuits to "explor[e] an entirely 'online court' experience for small claims cases. Specifically, the Task Force proposed an asynchronous online-judging-to-final-resolution provision without requiring the parties to appear in a physical courtroom."[142] The nature of this project differs from other states' asynchronous ODR pilot programs as well as from Florida's previous ODR program;[143] while other programs focus only on pretrial settlement involving court-trained volunteer facilitators, Florida's new program includes the "engagement of *judges* . . . to facilitate entirely or largely online resolution of the case—asynchronously or with a combination of asynchronous and synchronous *judging*."[144]

The Florida Supreme Court's order noted that the task force "recognized that the concept [of asynchronous trials] poses a number of legal, operational, and technological considerations and would necessitate additional analysis."[145] And it stressed that litigants would only participate voluntarily and should be allowed to opt out.[146]

Because Florida's asynchronous trial program is fairly new, its effectiveness is not yet known.[147] But this is nonetheless an important breakthrough, and if Florida's pilot program is successful, then asynchronous trials for high-volume civil adjudication could follow across the United States.[148]

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140. *See* MICH. STATE JUST. INST., *supra* note 128, at 61.

141. *See* Ash, *supra* note 117.

142. Sup. Ct. of Fla., *supra* note 4, at 3.

143. *See* Sup. Ct. of Fla., No. AOSC21-10, In Re: Online Dispute Resolution in the Trial Courts (Mar. 15, 2021), https://supremecourt.flcourts.gov/content/download/725321/file/AOSC21-10.pdf.

144. Sup. Ct. of Fla., *supra* note 4, at 4 (emphasis added).

145. *Id.* at 3.

146. *Id.* at 4.

147. *Id.* (The Florida Supreme Court's July 18, 2023, order stipulates that "[p]rospective pilot circuits shall notify the chief justice . . . prior to implementation by submitting *a detailed project plan*. Circuits also must provide a *status report* to the Supreme Court . . . no later than six months after launching a pilot project, including an update on the *progress of implementation* and *clear metrics* by which the circuit can capture the information needed to evaluate usage and assess performance of the online court concept." (emphasis added)); *see also* FLA. ONLINE DISP. RESOL. WORKGROUP, ONLINE DISPUTE RESOLUTION PILOT PROGRAM REPORT 4 (2021).

148. As Utah Supreme Court Justice Constandinos Himonas said, "The platform these folks have built is robust enough that we can take it to any level . . . . It's not just small claims cases. It's traffic, it's misdemeanors, it's family law, it's district court cases." Quaintance, *supra* note 121.

II. COMPARATIVE FOREIGN EXAMPLES

Globally, asynchronous trial practices are not a novel concept. While American courts are beginning to explore these innovative procedures, many foreign legal systems have embraced asynchronous elements, offering valuable lessons for their potential implementation in the United States. This Part examines comparative examples of asynchronous trials, focusing on continental law traditions and recent developments in Canada and Singapore. These examples offer insights into the episodic structure of and preference for written evidence in continental systems, as well as modern advancements in online asynchronous adjudication. Together, these foreign experiences illustrate the diversity and potential of asynchronous trials to improve access, efficiency, and fairness in legal proceedings.

A. The Continental Law's Asynchronous Traditions

Contrary to American courts' slow progress toward asynchronous trials, adjudication in continental law countries has long had a more asynchronous nature.[149] This is largely due to two key continental law traditions: an episodic style of proceeding and a preference for written evidence.

1. An Episodic Style of Proceeding

In stark contrast to the American tradition of concentrated trials, continental law countries traditionally considered the "decisive hearing" (i.e., the trial) to be merely one stage in a "procedural sequence" that included thorough pretrial preparation of evidentiary material as well as regular posttrial review of factual findings.[150] Even the trial itself was not a contiguous affair; it unfolded in phases during which evidence was gradually

149. The following description of the asynchronous nature of the continental law system does not involve any value judgment, meaning that this Article is not praising the continental advantage, nor is it arguing that the continental law system is better than the common law system. In fact, due to its asynchronous nature, the continental law system is disastrous when large-scale claims (i.e., complex legal disputes involving numerous parties, substantial amounts of evidence, or significant monetary stakes) are involved. Again, this reality indicates that asynchronous trials may work well for civil small claims but terribly for large claims. *See generally* Ronald J. Allen, Stefan Kock, Kurt Riechenberg, & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Ronald J. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988); Ronald J. Allen, *The Perils of Comparative Law Scholarship Research*, published in Spanish as "Los Peligros de Investigación en Derecho Comparado," *in* DEBATIENDO CON TARUFFO 21 (Jordi Ferrer Beltran & Carmen Vazquez eds., 2016).

150. *See* DAMAŠKA, *supra* note 42, at 59 ("[O]n the Continent . . . the decisive hearing before the initial decision maker was merely one stage of a procedural sequence. That sequence included thorough collection of the evidentiary material for the decisive hearing as well as reconsideration by higher courts of factual findings made in the course of that hearing."); *see also* Kaplan, *supra* note 41, at 419; MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 29–43 (1986).

assembled and examined. Today, this piecemeal style still characterizes continental adjudication, especially in civil cases.[151]

The episodic style of proceeding creates a mechanism for repeatedly checking the sources of information at successive procedural installments. Under this arrangement, as Mirjan Damaška states, "a more relaxed attitude may prevail toward the quality of the proponents' evidence" because continental judges naturally prefer to take in more evidence from the parties and apply less restrictive rules of evidence at trial.[152] For example,

> [i]f a witness reproduces an out-of-court statement in this environment, or if a document contains such a statement, there is usually enough time for the factfinder to seek out the original declarant for production in court at the next phase in proceedings. . . . Even if the declarant is unavailable, there is sufficient time before the next stage of the lawsuit to collect information to gauge the trustworthiness of the out-of-court declaration. In short, a relatively lenient approach to the use of [hearsay] is possible in episodic proceedings.[153]

The unhurried environment of continental adjudication (including the trial) facilitates additional asynchronous practices. For instance, continental judges commonly postpone the delivery of their written opinions for a long, silent interval after the last installment of trial proceedings. This means that the judge informs the parties of the case outcome asynchronously in a subsequent phase (another episode), rather than announcing the decision immediately at the conclusion of the trial.[154]

2. Preference for Written Evidence

In contrast with the common law tradition, continental judges generally prefer written evidence to live witness testimony. Structurally, episodic proceedings require written documentation to allow the judge (who is also the trier of fact[155]) to refresh their memory about what transpired earlier, meaning "the results of scattered previous proof-taking must be assembled for the decisive session."[156] As a result, "it becomes difficult to

151. For a portrayal of this "piecemeal" style in continental civil cases, see RUDOLF B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA, & PETER E. HERZOG, COMPARATIVE LAW 437 (5th ed. 1988); *see also* DAMAŠKA, *supra* note 42, at 59–60 ("Continental countries have struggled to redesign their proceedings by stages, attempting to upgrade the traditional final hearing into a climactic fact-finding event—at least for criminal cases. . . . [However, f]rom an outsider's standpoint, they still appear to be in the nature of a mere stage in a continuing procedural effort.").

152. DAMAŠKA, *supra* note 42, at 64.

153. Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 428–29 (1992).

154. DAMAŠKA, *supra* note 42, at 71.

155. The common law jury system does not exist in continental law countries. Lawsuits in a continental law system culminate in bench trials in which the trial judge is the factfinder. Some civil law countries like Germany allow lay people to participate in judicial factfinding, but they are teamed up with the trial judge and do not determine the facts independently. Zhiyuan Guo, *Lay Participation Reform in China: Opportunities and Challenges*, 98 CHI.-KENT L. REV. 221, 221 (2024).

156. DAMAŠKA, *supra* note 42, at 69.

prevent these written records from becoming the principal source of information for the ultimate decision-maker."[157]

Culturally, written evidence is often considered more reliable than a witness's live oral testimony in continental law jurisdictions.[158] And in practice, unlike in the common law tradition, written evidence in a continental law system does not need to be introduced by a live witness.[159] This preference for written evidence provides a friendly environment and congenital advantage for the development of asynchronous trials.

An extreme form of this attachment to documentary proof is the long-standing practice of incorporating the complete pretrial dossier—a comprehensive collection of all documents, witness statements, and evidence gathered before trial—as a crucial source for factual determination.[160] Judges study this dossier in advance to thoroughly understand the case before proceedings commence.[161] Thus, the better the judge is prepared, the more acquainted they are with the case before trial. "This implies, of course, that the presiding judge—who is also the fact finder—does not arrive at the decision exclusively on the basis of evidence and information conveyed to [them] during the trial."[162] Such a trial by dossier is asynchronous in nature.

B. Recent Developments in Asynchronous Trials Outside the United States

Earlier than or contemporaneous with American state courts' abovementioned launch of asynchronous pilot programs, several jurisdictions outside of the United States—including Canada, China,[163] members of the

157. *Id.* at 69–70.

158. *See* discussion *supra* Section I.A.3; *see also* Wang & Caruso, *supra* note 62, at 63.

159. *See* Torsten Lörcher, *Cultural Considerations in Advocacy: Continental Europe*, GLOB. ARB. REV. (Aug. 18, 2023), https://globalarbitrationreview.com/guide/the-guide-advocacy/sixth-edition/article/cultural-considerations-in-advocacy-continental-europe.

160. *See* Demetra Fr. Sorvatzioti & Allan Manson, *Burden of Proof and L'intime Conviction: Is the Continental Criminal Trial Moving to the Common Law?*, 23 CAN. CRIM. L. REV. 107, 113 (2019) ("In its purest form, there are no rules of evidence; all evidence in the dossier prepared for the trial is considered by the court.").

161. *See* Langbein, *supra* note 41, at 863 ("At trial the court would recall and examine key witnesses afresh, while facts not in serious controversy would be elicited from the pretrial dossier."); DAMAŠKA, *supra* note 42, at 70–71. *See generally* Huaqiang Si (但化强) & Yunjie Yu (余韵洁), *The Previous Life and This Life of the Centrality of Trials and the Dossiers* (审判中心主义与卷宗制度的前世今生), THE JURIST (法学家) (China) 97 (2020) (explaining that the dossier system began in continental Europe in the sixteenth and seventeenth centuries; its function is to discover the truth, fix the truth, and reproduce the truth).

162. DAMAŠKA, *supra* note 42, at 72.

163. For a detailed description of the development of asynchronous online courts in China, see Xi, *supra* note 10, at 58–64; *see also* Ariel Ye, *Update on Information Technology Used by Chinese Courts and Arbitration Institutions—CWG*, INT'L BAR ASS'N, https://www.ibanet.org/article/6DBAF025-9B9F-40C2-8D62-96F1893C2EFE (last visited Feb. 18, 2025).

European Union,[164] India,[165] Singapore, and the United Kingdom[166]—began exploring court-annexed asynchronous proceedings with varying degrees of success.[167] This Section introduces Canada's and Singapore's asynchronous trial programs and discusses what we can learn from them.

1. Canada's Civil Resolution Tribunal (CRT)

British Columbia, Canada, began operating an online public dispute resolution system, the Civil Resolution Tribunal (CRT), in 2015.[168] The CRT is Canada's first online tribunal to provide 24/7 services.[169] It is "an independent, quasi-judicial tribunal" that operates "under the authority of [British Columbia's] Civil Resolution Tribunal Act."[170] The CRT resolves four types of cases: motor vehicle accidents, small claims up to 5,000 Canadian dollars, real property disputes, and community disputes.[171] "Even though the CRT is an administrative tribunal rather than a formal court, it has actual civil jurisdiction over issues that a formal court would generally handle."[172] In December 2022, the Supreme Court of Canada in *Trial Lawyers Ass'n of British Columbia v. Attorney General of British Columbia*[173] reinforced the CRT's jurisdiction.[174]

The most attractive feature of the CRT system is that it offers an accessible, affordable way to resolve civil disputes without hiring a lawyer. The CRT is a four-stage process. Stage one is a self-help "Solution

164. For a general discussion of the European Union's development of and regulations on ODR including an asynchronous aspect, see Mania, *supra* note 36, at 78–80; for a brief discussion of *Burenrechter*, a court-annexed ODR procedure for resolving neighbor disputes commissioned by the Netherlands' Council of the Judiciary, see Sela, *supra* note 36, at 351.

165. For a summary of India's ODR development, including an asynchronous aspect, see Megha Shawani & Shubhangi Tiwari, *Impact of COVID 19 on Arbitration Proceedings; Online Dispute Resolution a Way Forward*, 19 SUPREMO AMICUS 285, 287 (2020).

166. *See* Xi, *supra* note 10, at 53–56 (describing the development of asynchronous online courts in the United Kingdom); *see also Money Claim Online (MCOL) User Guide*, GOV.UK, https://www.gov.uk/government/publications/money-claim-online-user-guide/money-claim-online-mcol-user-guide (Nov. 13, 2024).

167. *See* Rule, *supra* note 11, at 283 ("Courts in the United States were slower to realize this potential [of ODR] than courts in some other parts of the world.").

168. *See Society Disputes May Now Be Settled by BC Civil Resolution Tribunal*, NORTON ROSE FULBRIGHT (Aug. 2019), https://www.nortonrosefulbright.com/en-ca/knowledge/publications/303e1394/society-disputes-may-now-be-settled-by-bc-civil-resolution-tribunal.

169. *About the CRT*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/about-the-crt (last visited Feb. 4, 2025).

170. *Id.*; *see also* Civil Resolution Tribunal Act, S.B.C. 2012, ch. 25 (Can.), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01.

171. In the CRT context, "community disputes" typically refer to conflicts involving strata (condominium) properties or shared living arrangements. These disputes may include: (1) Strata Property Issues: Disagreements between property owners or tenants in a condominium complex, such as disputes over strata fees, maintenance responsibilities, bylaw violations, or the interpretation of strata regulations; (2) Neighbor Disputes: Conflicts between neighbors, such as those involving noise complaints, property boundaries, or shared resources; or (3) Shared Living Spaces: Disputes over common areas, amenities, or facilities used collectively by multiple individuals or groups. *See Solution Explorer*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca (last visited Feb. 4, 2025). The CRT is preparing for the addition of a new jurisdiction to the CRT: the Intimate Images Protection Act. *See* CIV. RESOL. TRIBUNAL, 2022/2023 ANNUAL REPORT, at iii, 14 (2023).

172. Xi, *supra* note 10, at 51–52.

173. 2022 CanLII 121522 (Can. B.C. S.C.).

174. *See* CIV. RESOL. TRIBUNAL, *supra* note 171, at i.

Explorer," which supports the users in understanding the nature of their legal issues and their possible remedies by asking simple questions and providing free legal information and tools based on users' answers.[175] If the parties choose to pursue the issue after exploring their options, then they move to stage two: "Negotiation." The CRT provides an automated platform where the parties can negotiate.[176] If the parties fail to reach an agreement, then a case manager[177] helps them reach an agreement that can be turned into an enforceable order in stage three, "Facilitation."[178] If the parties cannot reach a consensus, then the case moves to the final stage, "Decision," where an independent CRT tribunal member decides the outcome.[179] That decision is binding, just like a court order.[180] The parties may complete all four steps remotely and asynchronously.[181] Even in the final stage, most judgments are based on written materials that the parties asynchronously submitted.[182] The first three stages are confidential, while the CRT publishes all stage-four final and default decisions to its official website.[183]

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175. *See The CRT Process*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/crt-process (last visited Feb. 4, 2025).

176. *See What Is Negotiation?*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/help/what-is-negotiation (last visited Feb. 4, 2025).

177. CRT case managers are integral staff members who facilitate the resolution of disputes through various stages. They are not volunteers but are employed by the CRT to ensure efficient and fair processes. While specific qualifications for CRT case managers are not publicly detailed, a similar role in other jurisdictions, for example, a Civil Case Manager position in Florida, requires two years of related case management or administrative experience. Additionally, the CRT emphasizes cultural agility and encourages candidates from diverse backgrounds to apply, which indicates a commitment to serving a broad population. *See Civil Resolution Tribunal*, FACEBOOK (Oct. 19, 2023), https://www.facebook.com/CivilResolutionTribunal/posts/821475703316397 (showing CRT's job posting for "Case Managers"); *see also Job Description: Civil Case Manager*, STATE OF FLA. TWELFTH JUD. CIR., https://www.jud12.flcourts.org/Court-Administration/Career-Opportunities/Civil-Case-Manager-OPS (last visited Feb. 4, 2025) (showing Florida courts' job posting for "Civil Case Manager").

178. *See What Is Facilitation?*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/help/what-is-facilitation (last visited Feb. 4, 2025).

179. CRT tribunal members are appointed officials responsible for adjudicating disputes within the CRT's jurisdiction. They are qualified legal professionals appointed through a merit-based process, compensated for their work, and trained to adjudicate disputes within the tribunal's jurisdiction. *See Code of Conduct for Tribunal Members*, CIV. RESOL. TRIBUNAL (Sept. 2023), https://civilresolutionbc.ca/wp-content/uploads/Tribunal-Member-Code-of-Conduct-Sep-2023.pdf.

180. *See What Is a Final Decision?*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/help/what-is-a-final-decision (last visited Feb. 4, 2025).

181. *See* Xi, *supra* note 10, at 52.

182. *See What Is the Decision Preparation Process?*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/help/what-is-the-decision-preparation-process (last visited Feb. 4, 2025) ("This preparation process is usually done online and in writing. The legal term is a 'written hearing.' Sometimes the tribunal member will decide it's necessary to have an 'oral hearing' instead of a written one. Oral hearings are done by phone or videoconference. Participants can also ask for an oral hearing, but it's up to the tribunal member to decide.").

183. *See Decisions*, CIV. RESOL. TRIBUNAL, https://decisions.civilresolutionbc.ca/crt/en/nav.do (last visited Feb. 4, 2025).

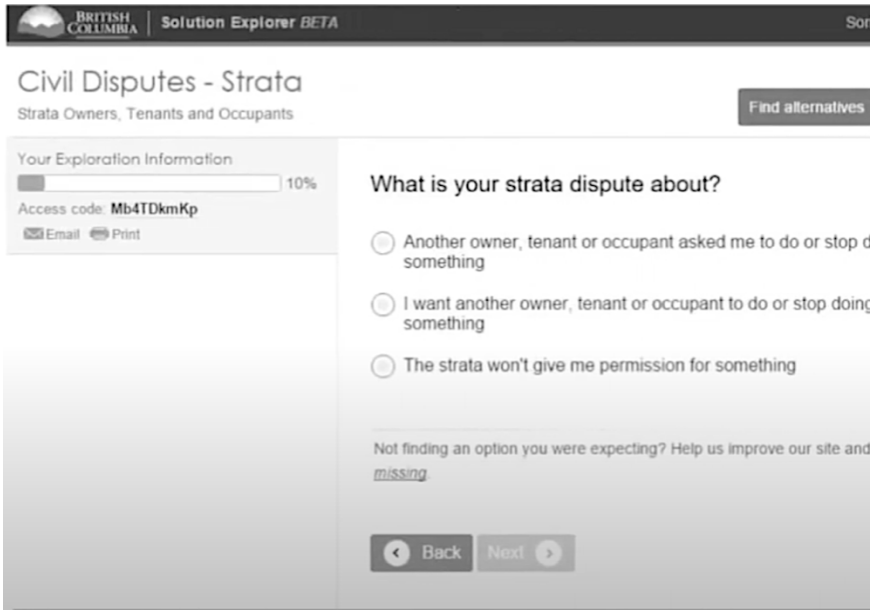

Diagram 2: CRT's system user interface: filling out a civil dispute form.

The CRT is arguably one of the best asynchronous ODR platforms in the world.[184] From April 1, 2022, to March 31, 2023, the CRT received 7,260 claim applications.[185] This represents a 37% increase from the previous year,[186] and the volume of applications increased for all types of claims.[187] Based on aggregate participant satisfaction survey results for 2022–2023, 91% of dispute participants felt that CRT staff were professional, 84% felt they were treated fairly, and 78% would recommend the CRT to others.[188]

The CRT's popularity is largely due to two factors. First, it is by far the most comprehensive ODR mechanism globally. CRT users can participate in pretrial asynchronous negotiation and mediation as well as asynchronous adjudication or trial.[189] In the adjudication phase, synchronous video or oral hearings are also available if the parties do not want to do

184. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 13 ("British Columbia was able to design a system from scratch that is generally recognized as one of the best ODR platforms.").

185. The CRT is employed only within the jurisdiction of British Columbia. *See* CIV. RESOL. TRIBUNAL, *supra* note 171, at i, 17.

186. *Id.* at 17.

187. *Id.*

188. *Id.* at 35.

189. In contrast, the Utah and Michigan pilot programs only focus on the pretrial ODR, while the Florida pilot program focuses on asynchronous trials. *See* Deno Himonas, *Utah's Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 882 (2018); *Community Dispute Resolution Program Mediation*, MICH. JUDICIARY, https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/CDRP/ (last visited Feb. 4, 2025); Sup. Ct. of Fla., *supra* note 4, at 1, 3–4. The CRT functionally combines all three state programs in one. *See The CRT Process*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/crt-process (last visited Feb. 4, 2025).

asynchronous written hearings.[190] For disputants who are unable or unwilling to use the online platform to resolve their dispute, the tribunal provides paper- and telephone-based services.[191] Disputants who are unhappy with the adjudication outcome may appeal the CRT's decision.[192] Second, the CRT is friendly to pro se disputants and utilizes a human-centered design. For example, all documents that are available through the CRT are written at a sixth-grade reading level (the average reading level in Canada).[193] Disputants can easily use the CRT website on their phones without downloading an application. Besides English, CRT users can switch freely to twelve other languages at no additional cost.[194] Further, the CRT ensures that its service fees are modest.[195] And for disputants who find even these minimal fees prohibitive, "the CRT uses a simple fee waiver process to avoid the typical onerous process low-income [disputants] often face when attempting to obtain a waiver, requiring [them] to fill out a simple one-page form which notifies the CRT of the reason the litigant requires a fee waiver."[196]

Even when a disputant cannot get a fee waiver, the overall cost of resolving a dispute through the CRT is still significantly lower than the overall cost of a traditional court case because CRT disputants can manage their case without a lawyer's assistance. This cost-effectiveness boosts CRT's popularity. Ironically, many lawyers now oppose the system due to its effectiveness because it has drastically reduced the number of lawyers hired for the four types of civil disputes that the CRT covers in British Columbia.[197]

2. Singapore's Asynchronous Court Dispute Resolution (aCDR)

Singapore conducts asynchronous hearings differently, using an already widespread and accessible means of online asynchronous communication: email. During the COVID-19 pandemic, Singapore established the asynchronous Court Dispute Resolution (aCDR) process, with hearings held by email.[198] This asynchronous system has been not only retained

190. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 11–12.

191. *See* Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS TO JUST. 112, 114 (2017).

192. Nonetheless, statistics show that 3.4% of CRT resolutions are appealed. *See* CIV. RESOL. TRIBUNAL, 2019/2020 ANNUAL REPORT 11 (2020).

193. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 11–12.

194. *See* CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca (last visited Feb. 4, 2025).

195. *See Fees*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/resources/fees (last visited Feb. 4, 2025).

196. MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 12. The criteria the CRT uses to grant a fee waiver request includes income, expenses, and participation in assistance programs like British Columbia Income Assistance, Income and Disability Assistance, or the Canada Guaranteed Income Supplement. *See Fee Waiver Request*, CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/resources/forms/fee-waiver-request (last visited Feb. 1, 2025).

197. Xi, *supra* note 10, at 53.

198. *See* State Cts. of the Republic of Sing., Registrar's Circular No. 2 of 2020, Asynchronous Court Dispute Resolution Hearings by Email (aCDR) for Case Management Lists at the State Courts Centre for Dispute Resolution (SCCDR) ¶ 1 (Mar. 5, 2020); *see also* TAN K. B. EUGENE, YONG PUNG HOW SCH. OF L., SINGAPORE: NATIONAL REPORT FOR THE GLOBAL ACCESS TO JUSTICE PROJECT 120

but also reinforced in the wake of the pandemic.[199] The aCDR conducts exclusively asynchronous hearings for noninjury motor accident claims, personal injury claims, and negligence claims such as medical and professional negligence.[200]

In the aCDR process, the parties initiate a case, provide updates on its progress,[201] and ask the court for directions by email; the court responds by email with the appropriate directions and rulings. All of this back-and-forth communication and instruction happens within a short period of time.[202] The judge holds "paper hearings" to review submitted documents.[203] However, aCDR judges can also require the parties and their counsel to attend regular in-person hearings when necessary.[204]

While other countries have been competing with one another in research and development investment in order to build their own asynchronous ODR applications and user portals, the beauty of Singapore's aCDR email system is its back-to-basics nature. It is readily accessible and easy

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(2021); Brett Milano, *Online Courts: Reimagining the Future of Justice*, HARV. L. TODAY (Dec. 4, 2020), https://hls.harvard.edu/today/online-courts-reimagining-the-future-of-justice/; JUD. SERV. COMM'N, ANNUAL REPORT 2022, at 29 (2022).

199. *See* State Cts. of the Republic of Sing., Registrar's Circular No. 4 of 2023, Updates to Registrar's Circular No. 2 of 2020 ¶ 1 (Feb. 27, 2023).

200. *Id.* ¶ 4. Unlike most other asynchronous online courts, the aCDR does not set a limit on damages or focus on small claims only. Also, mediation of civil cases does not fall within the scope of the aCDR process. *Id.* ¶ 5.

201. In Singapore's aCDR process, parties are required to provide updates on the progress of their case by submitting a joint email to the court. *Id.* ¶ 6. This email should succinctly outline the current status of the case, any applications or directions sought, and the reasons for them. *Id.* ¶¶ 9–10. The Mentioning Counsel, typically the plaintiff's or claimant's counsel, is responsible for sending this email on behalf of all parties, ensuring that it is copied to all other counsel or unrepresented parties. *Id.* ¶¶ 12–13. These updates are not intended to report on independent negotiations between the parties. Instead, they serve to inform the court of the case's status and to request any necessary directions or rulings to facilitate its progression. While parties may engage in negotiations independently, the aCDR process focuses on managing the case through structured communication with the court, primarily via email, to ensure efficient and effective dispute resolution. *See id.* ¶ 2.

202. *See, e.g.*, *id.* ¶ 9 ("Not less than two working days before the date of the aCDR hearing . . . parties must send an email to the Court . . . to provide an update on the progress of the case, and to state any application or direction they seek from the Court."); *id.* ¶ 19 ("Where the Court has a query, or requires further submissions or evidence, the Court may give directions in the reply email and adjourn the aCDR hearing for these to be addressed. Counsel must respond in the same email chain not less than two working days before the next aCDR Date." (emphasis omitted)). The term "aCDR Date" is defined in Registrar's Circular No. 2 of 2020 issued by the State Courts of Singapore. *See* State Cts. of the Republic of Sing., *supra* note 198, at ¶¶ 9, 35–36. This circular introduced the aCDR process conducted via email. *Id.* ¶ 1. According to the circular, the "aCDR Date" refers to the scheduled date on which the court will review the submissions and responses from the parties involved in the aCDR process. *See id.* ¶ 35. Parties are required to respond to the court's directions within the same email chain at least two working days before the next aCDR Date. *Id.* ¶ 19. The aCDR Date helps manage the flow of communication and ensures that the court and all parties have enough time to prepare for the next step in the process. By adhering to this schedule, the aCDR process maintains efficiency while accommodating the asynchronous nature of the communication. *See id.* ¶ 2.

203. State Cts. of the Republic of Sing., Registrar's Circular No. 13 of 2020, Asynchronous Hearing and Processing of Pre-Assessment of Damages Alternative Dispute Resolution Conferences, at S/No. 2 (June 29, 2020). Registrar's Circular No. 13 of 2020, issued by the State Courts of Singapore, addresses the conduct of "paper hearings," indicating that the court may fix matters for such hearings based on the documents submitted by the parties. *Id.* This circular further emphasizes the court's discretion to determine the appropriate mode of hearing based on the circumstances of each case. *Id.* ¶ 6.

204. State Cts. of the Republic of Sing., *supra* note 203, ¶ 6.

to expand, it entails no extra cost for the court or the parties, and, most importantly, it works. Although the aCDR system lacks the eye-catching nature of other asynchronous platforms, the goal of judicial activities should not be a fancy appearance but rather the realization of justice in the most efficient and effective way possible, which is exactly the aCDR system's aim.

Certainly, the aCDR's efficiency and effectiveness require the discipline of all involved. Counsel must send email applications and updates on time and with sufficient information and supporting documents for the court to make a fully considered decision and give the appropriate directions promptly. To ensure that the system runs smoothly, the State Courts of Singapore set several aCDR rules, including strict requirements for the aCDR email accounts attorneys use,[205] the subject line,[206] the content of messages,[207] the maximum message size (including all attachments),[208] the length of email chains,[209] and the time allotted to send an email.[210] To promote compliance with these rules, the Law Society of Singapore provides email templates for various situations and encourages parties and their counsel to use them:[211]

205. All communication with the court by counsel for aCDR hearings must be through the counsel's official email account and must be sent in the name of the counsel to the aCDR email account stated in the court notice. *See* State Cts. of the Republic of Sing., *supra* note 199, ¶ 7. There is a total of twelve aCDR email accounts stated in the Registrar's Circular No. 4 of 2023 (from SC_aCDR1@judiciary.gov.sg to SC_Acdr12@judiciary.gov.sg). *Id.* ¶ 8.

206. *Id.* ¶ 13(a) ("The subject heading of the Email must identify the *case number* and the aCDR Date . . . .").

207. *See, e.g.*, *id.* ¶ 27 ("Where case management directions are sought from the Court, the Email must state: (a) the progress of the case; (b) the directions sought; (c) the reasons for seeking those directions; and (d) the proposed timelines.").

208. *Id.* ¶ 15 ("Due to system limitations, the maximum size of each Email (including all attachments) must not exceed 30 MB. If the Email and attachments exceed this limit, they can be sent by email in separate batches or the attachments may be sent *via* a cloud storage . . . .").

209. *Id.* ¶ 16 ("For each aCDR Date, a *new* Email must be sent . . . . Long email chains should be avoided . . . .").

210. *Id.* ¶ 17 ("The Email must be sent to the Court not less than two working days before the aCDR Date.").

211. *Id.* ¶ 13(c) ("Counsel may use the [aCDR email] templates issued by the Law Society of Singapore from time to time.").

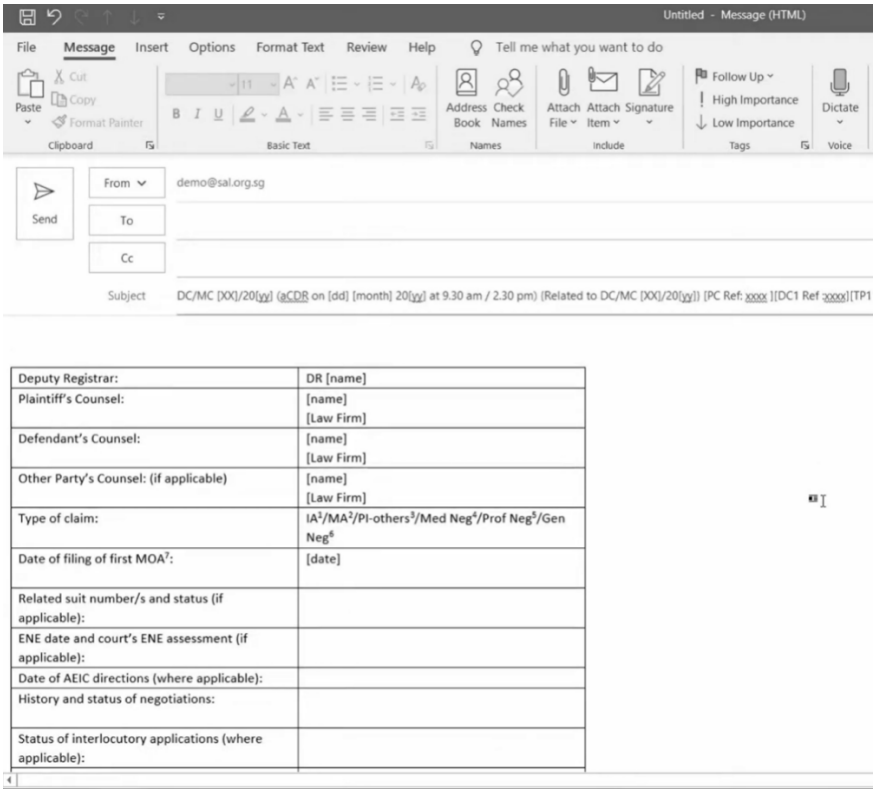

Diagram 3: An email template for aCDR hearings.[212]

When comparing Singapore's aCDR system to other asynchronous online court applications such as British Columbia's CRT, one of its shortcomings is its unfriendliness to pro se litigants.[213] The formality requirements for the emails are burdensome for unrepresented parties, putting them at a significant disadvantage if an opposing party is represented by counsel. Noncompliance with these requirements can delay case progression because the court may need to seek clarifications or additional submissions, leading to adjournments and increased costs.[214] Additionally submissions that are improperly formatted or incomplete may hinder the court's ability to manage the case effectively, potentially impacting the litigant's ability to present their arguments.

212. Singapore Academy of Law, *Email Templates for Asynchronous Court Dispute Resolution (aCDR) Hearings*, YOUTUBE (Feb. 17, 2021), https://www.youtube.com/watch?v=Y2vnT8XBcfg.

213. *See* Xi, *supra* note 10, at 58 ("[L]awyers are indispensable in the aCDR system, which is highly unfriendly to self-represented litigants.").

214. *See generally* State Cts. of the Republic of Sing., *supra* note 199. For instance, the Registrar's Circular No. 2 of 2020 emphasizes that only one email should be sent to the court on behalf of all parties for each aCDR hearing, and it must be sent by the counsel mentioning the case for the other parties. *Id.* ¶ 10. Additionally, the Registrar's Circular No. 4 of 2023 reiterates the importance of compliance with email protocols, specifying that the email must be sent to the aCDR Email Account specified in the court notice. *Id.* Noncompliance with these requirements can disrupt the progress of the case and may lead to further procedural complications. *See id.* ¶¶ 42, 53.

III. ASYNCHRONOUS TRIALS: PROS AND CONS

On the one hand, trials in American courtrooms follow a tradition of synchronicity that has existed for hundreds of years. On the other hand, since the start of the COVID-19 pandemic, both the general public and members of the legal profession have become familiar with a prototype of online hearings (live videoconferences via, e.g., Zoom) and have benefited from their convenience. After the pandemic eased, most courts kept online hearings as an option, but they began to largely restrict these hearings to pretrial proceedings. In the meantime, various court-annexed (and again mostly pretrial) ODR programs with asynchronous aspects emerged in state courts. Are asynchronous trials the next development? If so, what can be discovered now to determine how to implement it later? To answer these questions, we must first identify and compare the potential advantages and disadvantages of asynchronous trials. As the following discussion indicates, matters are rarely black and white. Many of the points discussed below possess dual implications.

A. Advantages of Asynchronous Trials

Asynchronous trials are emerging as a transformative model in modern adjudication, offering significant advantages over traditional in-person and synchronous remote proceedings. By allowing participants to engage in the legal process at their own convenience, these trials remove both place and time constraints, opening new avenues for efficiency and access to justice. This Section examines the advantages of asynchronous trials, from increased flexibility and reduced logistical burdens to expanded accessibility for pro se litigants. Additionally, it explores the added value asynchronous trials can bring—including enhanced fact-finding, reduced bias, and a more inclusive system.

1. Efficiency

Asynchronous trials could significantly enhance efficiency in terms of both travel costs and opportunity costs. Remote hearings during the COVID-19 pandemic freed people from the place limitation, meaning that the attorneys, parties, witnesses, and judge no longer needed to physically meet up in brick-and-mortar courthouses. From this change came the "Pajama Court," named for the attendees who threw dress shirts over sweatpants because the webcam only showed their upper bodies.[215] Though these remote proceedings have dramatically increased convenience, asynchronous trials would go one step further, breaking down not only place limitations but also time limitations—allowing parties to work around professional and personal commitments. Both parties would be given a designated amount of time in which to present their case at their own

215. *See* Quaintance, *supra* note 121.

convenient place and time. Then, the judge would work on the case at their own convenient place and time.[216]

This extra freedom in asynchronous trials has several advantages over synchronous remote hearings. First, it could significantly ease scheduling conflicts and delays. Parties, witnesses, and judges who might otherwise struggle to find time for trial dates within their busy schedules would have no excuse to delay proceedings if they could participate asynchronously.[217] Second, asynchronous trials could remedy issues pertaining to time zone differences, which were a major concern with the synchronous nature of the first generation of remote trials.[218] Significant time zone differences can cause serious logistical problems, resulting either in shorter hearing days (and thus a longer overall length of the hearing) or uncomfortable login times for some participants. For example, in one case, counsel had to regularly get up at three o'clock in the morning to attend a remote hearing.[219] This problem would vanish in an asynchronous trial.[220]

In addition, the asynchronous model would allow parties to better utilize fragmented availability throughout the day to participate in the trial.[221] A litigant could type and send a rebuttal while waiting in the pickup line at their child's school or deliver a closing statement before going to sleep after a full day of work. On the other end, judges and their clerks could monitor multiple case hearings at the same time. Conversely, in the synchronous mode (whether remote or in person), a judge can only adjudicate one trial at a time.[222]

Finally, evidentiary presentation through written or video submissions could be more condensed and therefore more focused than either in-person or remote live-witness testimony. Studies indicate that the synchronous trial mode wastes the time of everyone involved.[223] Live "testimony involves plenty of proverbial throat-clearing, parrying, dodging, and repeating."[224] In contrast, the natural delay embedded in the asynchronous trial would allow participants to think thoroughly before presenting their

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216. *See* Robertson & Shammas, *supra* note 2, at 143.

217. *See* Scherer, *supra* note 1.

218. *Id.* ("[E]xperience with remote hearings in recent weeks and months has shown that one major issue relates to the participants' different time zones.").

219. *Id.*

220. *Id.*

221. *See The First of Its Kind in the Province! "Asynchronous Trial" Is Here* (全省首创！"异步审理"来了), SANMING INTERMEDIATE CT. (三明中院) (Apr. 7, 2023), https://mp.weixin.qq.com/s?__biz=MzA5NzM2NTcwMA==&mid=2650807304&idx=1&sn=6400aa4e0ff7ac5b44d984554d6deb49 (discussing that at the court's asynchronous trial platform, the judge and parties used their "fragmented" time to successfully complete all the operations; the case was successfully resolved).

222. *Id.* ("Judges can handle multiple cases online at the same time, effectively alleviating the current tight scheduling situation, greatly improving trial efficiency, and relieving the pressure on judges.").

223. *See* Stephen D. Susman & Richard L. Jolly, *An Empirical Study on Jury Trial Innovations*, CIV. JURY PROJECT, Feb. 2017, at 101, 103, https://civiljuryproject.law.nyu.edu/wp-content/uploads/2016/10/sds-rlj_Empircal-Study-on-Trial-Innovations.pdf (arguing for time limits on trials).

224. *See* Robertson & Shammas, *supra* note 2, at 136.

testimony. Moreover, any improper or unnecessary material could be edited out of written, audio, or video testimony before submission.[225]

Still, to determine whether asynchronous trials would surpass in-person and synchronous online trials in terms of efficiency, it is imperative to consider the nature of the cases being adjudicated. Asynchronous trials promise superior efficiency for high-volume, relatively straightforward civil disputes.[226] A reliance on text-based communication between parties and the court would be particularly advantageous for resolving uncomplicated matters expeditiously.[227] However, for more complex cases or those with more significant implications, litigants are likely to prefer traditional in-person adjudication.[228] In these instances, the asynchronous mode of communication could potentially lead to inefficiencies and be detrimental to the effective administration of justice.

2. Increased Access to Justice

Asynchronous trials represent a significant opportunity to expand access to justice. First, they could increase citizen engagement in the legal process. Historically, many individuals have refrained from filing lawsuits over minor grievances, such as disputes over small sums owed between neighbors, incorrect utility billing, or minor damages caused by a contractor. These individuals often perceive the logistical challenges and time commitments of traditional legal proceedings—such as scheduling and attending courtroom appearances—as outweighing the benefits of seeking a fair resolution.[229] And for defendants in small claim lawsuits, no-shows and defaults are often easier than participating in the proceedings.[230] Asynchronous trials would remove many of these participation barriers. Courts

225. *Id.*

226. For a detailed discussion of the suitable scope of asynchronous trials, see discussion *infra* Section IV.A.

227. *See* Benjamin H. Barton, *The Future of American Legal Tech: Regulation, Culture, Markets*, *in* LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 21, 41–43 (David Freeman Engstrom ed., 2023).

228. *See generally* THE NAT'L JUD. COLL., RESOURCE GUIDE FOR MANAGING COMPLEX LITIGATION 10 (2010). This presumed preference is grounded in the necessity for thorough cross-examination, the ability to gauge witness credibility through non-verbal cues, and the importance of direct judicial oversight. In-person adjudication allows for more dynamic and immediate interactions among parties, which is crucial in complex legal matters, where nuances and immediate clarifications can significantly affect the outcome. This need cannot be easily accommodated in an asynchronous format. For instance, water law adjudications in Nevada have highlighted the necessity of specialized, in-person judicial processes due to the intricate and highly technical nature of such cases. *See* Ron Parraguirre, *Nevada's New Approach to Adjudication of Water Law Cases*, STATE BAR OF NEV., https://nvbar.org/nevadas-new-approach-to-adjudication-of-water-law-cases/ (last visited Feb. 18, 2025). Similarly, the effective management of large-scale corporate litigation often requires in-person hearings to address the multifaceted aspects of these cases efficiently. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 670–71 (2010).

229. *See* Anjanette H. Raymond & Pranita Sarangabany, *Appendix D: Online Dispute Resolution White Paper in* TECH. WORKING GRP. RECOMMENDATIONS 80, 81 (2021), https://www.in.gov/courts/admin/files/innovation-twg-report.pdf.

230. *Id.*

could offer asynchronous proceedings for free or at a minimal cost.[231] Moreover, people who lack flexibility in their work schedules could still participate in the legal process, which would operate 24/7.[232] Litigants who live far from the nearest courthouse could avoid travel time and associated travel costs.[233] Also, participants would not need to worry about their Internet speed or camera resolution because communication in asynchronous trials would be mostly done through texting, not videoconference.[234] And for those instances when videos or voice recordings might be preferred over text, the flexibility of asynchronous scheduling would allow participants to make arrangements before making submissions, unlike remote trials where Internet speed or outages can interfere with the proceedings in real time.

Second, asynchronous trials would allow pro se litigants to obtain justice without hiring an attorney. Many people who need the court system cannot afford to hire a competent attorney.[235] The traditional court system, including synchronous online hearings, "was designed to be navigated by individuals who understand its complex processes and specialized language."[236] For pro se litigants, it is not immediately apparent what steps they need to take or what documents they need to file at each stage of the litigation process, often causing confusion and frustration. Asynchronous trials would help redeem this experience for pro se litigants,[237] allowing them to expeditiously resolve their claims. Like with British Columbia's CRT, this could be done in part by making information, assistance, and advice readily available in simple language through a user portal.[238] Also, when pro so litigants encounter difficulties in an asynchronous trial, they would have the time they need to think, conduct research, or seek help from outside experts before having to reply to the other side and to the court, rather than merely relying on their own intuition—which is often wrong. This time delay could be a game changer, allowing self-represented parties to manage and even win their own cases. Moreover, studies indicate that asynchronous processes can be less intimidating than

231. *See, e.g.*, Press Release, *supra* note 5 ("AK ODR is free to use. And if parties don't have a court case and want a judge to sign their agreement to be a court order, the cost is only $25 (instead of the regular court case filing fee which would be $50–$150). Using AK ODR saves people legal fees, travel costs, and having to take time off of work or find childcare.").

232. *See* Rule, *supra* note 11, at 278.

233. *See* GOALS AND RECOMMENDATIONS, *supra* note 7, at 11.

234. *See* Press Release, *supra* note 5 ("Anyone with access to the internet and a computer can use AK ODR.").

235. *See* CHARLES R. DYER, AM. ASS'N OF L. LIBRS., SELF-REPRESENTED LITIGANTS: A GUIDE FOR GOVERNMENT AND COURT DECISION-MAKERS 1 (2018), https://www.aallnet.org/gllsis/wp-content/uploads/sites/9/2018/01/scllguide4.pdf.

236. Colin Rule, *Online Dispute Resolution and the Future of Justice*, COLIN RULE, https://www.colinrule.com/writing/future.pdf (last visited Feb. 26, 2025).

237. *See* MASS. ACCESS TO JUST. COMM'N, *supra* note 2, at 14.

238. *See* Raymond & Sarangabany, *supra* note 229, at 81 ("ODR platforms can be used as an educational tool in preparation for a dispute. Relevant resources are easier to access through technology, allowing ordinary people to better understand their legal rights and options. With the ability to virtually learn about laws at their own pace, ODR users can confidently protect their rights.").

synchronous court proceedings, reducing stress and anxiety for pro se litigants.[239]

Moreover, asynchronous trials would expand the plurality of process options our modern-day "multidoor courthouse" offers. In 1977, Harvard law professor Frank Sander gave a speech on expanding access to justice in which he described a new vision for a "multidoor courthouse" that would offer a variety of resolution pathways for different dispute types.[240] Carrie Menkel-Meadow coined the term "process pluralism."[241] Making asynchronous trials an option available to disputants—alongside traditional in-person trials and synchronous online trials—would itself be procedural justice. A one-size-fits-all courthouse will not meet all of disputants' needs; there are many feasible scenarios in which parties might choose an asynchronous trial, ranging from simple convenience to personal preference (e.g., the parties might feel that they are better able to express themselves in writing) to broader systemic reasons (e.g., the elimination of race-based outcome disparities by avoiding face-to-face contact).[242]

Lastly, any form of remote access to courts would benefit individuals with disabilities.[243] Asynchronous trials could provide even more advantages over synchronous online proceedings for individuals with disabilities. Unlike synchronous formats, which require participants to adhere to specific schedules and engage in real-time communication, asynchronous trials allow participants to proceed at their own pace and at times that suit their needs. This flexibility can be particularly beneficial for individuals with mobility challenges, chronic pain, or conditions that require frequent rest or medical attention. Additionally, asynchronous trials minimize the need for sustained focus in front of a screen, which can be taxing for individuals with visual impairments, neurodivergent conditions, or anxiety disorders. By reducing these barriers, asynchronous trials can make the legal process more accessible, empowering individuals with disabilities to participate more fully and effectively.

Nonetheless, two counterarguments warrant consideration. First, although asynchronous adjudication systems such as British Columbia's CRT and Singapore's aCDR are designed to be user-friendly, they inherently require participants to have Internet access, a smartphone or

239. *See* Press Release, *supra* note 5 (citing that ODR can offer "Reduced Stress").

240. *See* Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437, 437–38 (2006).

241. *See* Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 42 (2002).

242. *See* Rabinovich-Einy, *supra* note 28, at 61–62.

243. There has been a huge increase in the number of disabled people since the start of the COVID-19 pandemic. *See* U.S. Bureau of Labor, *Population—With a Disability, 16 Years and Over*, FED. RSRV. BANK OF ST. LOUIS (Jan. 10, 2025), https://fred.stlouisfed.org/series/LNU00074597; *see also* Avital Mentovich, J.J. Prescott, & Orna Rabinovich-Einy, *Legitimacy and Online Proceedings: Procedural Justice, Access to Justice, and the Role of Income*, 57 L. & SOC'Y REV. 189, 199–200 (2023).

computer, and basic typing proficiency and technological literacy. These technological prerequisites could impose a substantial barrier for the elderly, economically disadvantaged, and less educated individuals.[244] In 2023, approximately 42 million Americans still lacked access to broadband Internet, with even more severe deficits observed globally, particularly in developing countries.[245] Unlike traditional trials, which do not necessitate such technological infrastructure, asynchronous trials could effectively exclude these vulnerable groups, undermining the very objective of expanding access to justice.

In addition to technological barriers, asynchronous trials also raise potential procedural justice concerns. The fundamental right to cross-examine adverse witnesses would be compromised in a text-based process, potentially affecting the fairness of the trial. Cross-examination is a critical tool for uncovering the truth and ensuring both parties have a fair opportunity to challenge their opponent's case. The lack of real-time interaction in asynchronous trials could also hinder the parties' ability to effectively challenge testimony and assess witness credibility.[246] Moreover, the principle of open justice, which mandates that trials be accessible to the public for observation, would be at risk.[247] Asynchronous trials would limit public access and scrutiny, thereby reducing transparency and the educational value of public proceedings.[248] Consequently, while asynchronous trials could enhance access to justice in certain respects, they could also diminish it in others, necessitating a careful evaluation of their broader implications.

3. Added Value

Asynchronous trials offer other value-added features. One is that the whole process of an asynchronous trial and every activity in it could be saved into a system. Participants could review previous text, audio, and video entries) an unlimited number of times before inputting a new entry or making a decision, which could promote an enhanced understanding of

244. *See* Emily A. Vogels, *Digital Divide Persists Even As Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption; Tiffany Benjamin & Tom Kamber, *Investing in Digital Literacy to Better the Health of America's Seniors*, CORNELL UNIV. DEP'T OF SOCIO. (Feb. 20, 2024), https://sociology.cornell.edu/news/investing-digital-literacy-better-health-americas-seniors.

245. *See* John Busby, Julia Tanberk, & BroadbandNow Team, *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BROADBANDNOW (Jan. 16, 2025), https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent; *see also* João Aguiar, *One-Third of the Global Population Remains Offline*, INTERNET SOC'Y PULSE (Dec. 6, 2023), https://pulse.internetsociety.org/blog/one-third-of-the-global-population-remains-offline.

246. One potential solution to address this specific concern is to develop a hybrid system that integrates both asynchronous and synchronous communication elements. *See* discussion *infra* Section IV.B.3.

247. *See* HOUSE OF COMMONS JUST. COMM., OPEN JUSTICE: COURT REPORTING IN THE DIGITAL AGE 3 (2022).

248. The public would still have access to the records from asynchronous trials.

and accurate factfinding in the case.[249] Also, this means that the appellate court would have access to the exact same information as the trial judge—an advantage that is simply not available for synchronous proceedings. Thus, asynchronous trials could reduce the costs of remanding to correct an error.[250]

Another added value of asynchronous trials is that parties could revise their entries (whether written, audio-based, or video-based) before submitting them. Compared to live witness testimony in a synchronous trial, carefully edited entries could facilitate more dispassionate consideration of the evidence by enhancing clarity and concision[251] and removing prejudicial, raw emotions.[252]

In addition, the main form of communication and evidence in asynchronous trials—texting and written evidence—is race-neutral and could thereby significantly mitigate any racial biases that the factfinder holds. Studies indicate that judges are more likely to be deceived by false statements or mistaken witnesses when observing live testimony than when dealing with written testimony.[253]

B. Deficits of Asynchronous Trials

While asynchronous trials offer numerous advantages, they are not without significant drawbacks. One critical concern is the potential loss of solemnity, a cornerstone of traditional trial proceedings that reinforces their gravity and legitimacy. The informal nature of asynchronous trials could diminish engagement, reduce focus, and compromise the perceived authority of the judicial process. Critics also highlight practical challenges, such as the inability to interrupt or cross-examine witnesses in real time and the reduced opportunity to observe demeanor and body language. This Section explores these deficits in detail, analyzing how asynchronous trials might undermine certain aspects of judicial proceedings while emphasizing the importance of balancing technological innovation with the preservation of judicial integrity.

1. Diminished Solemnity

Despite all the potential advantages of asynchronous trials, they are not a panacea. One of their most serious shortcomings is reduced solemnity; they simply would not have the same level of formality and gravity

249. *See* Scherer, *supra* note 1.
250. *See* Robertson & Shammas, *supra* note 2, at 137.
251. *Id.* at 136, 141.
252. *Id.* at 139–40.
253. *See, e.g.*, Emily Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 827 (2011) ("Witness presence, in other words, may often harm, rather than improve, the accuracy of credibility assessments."); Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 225 (2006) (explaining that deception detection may increase in accuracy when using audio-only or text-only presentations, where the one assessing the statement may focus fully on the verbal content of it as opposed to focusing on both verbal content and visual cues).

as traditional trials. This is not a new concept. The first generation of online court—synchronous remote hearings—also lacks the solemnity of traditional court. Legal insiders still laugh about the 2021 "Zoom cat lawyer" incident, when a lawyer from Texas got stuck in kitten filter mode during a Zoom hearing.[254] Judges have also complained about the informality of remote hearings. For example, as Lord Pentland, who had "serious doubts" over the quality of substantive hearings held online, stated,

> [The dialogue] between bench and bar . . . cannot be replicated online . . . . The rituals and symbols which reflect the authority and independence of the court are missing. . . . The image of the court as a place communicated the court's separateness, legitimacy and standing. I doubt that the same effect would have been achieved if the judgement of the [bench] had been delivered from and analyzed over a studio-based news desk.[255]

Nonetheless, to attend synchronous remote hearings, participants still need to schedule the hearing, mark their calendars for the hearing date, dress formally (at least above the waist), and meet other participants on a videoconference platform.[256] Thus, although the court is no longer a physical place in the first generation of online court, there is still an element of solemnity involved. Asynchronous trials would take informality to a whole new level. Pro se litigants could attend trial by simply texting the judge and the opposing party while wearing pajamas or cooking dinner. Although this sense of ease might help pro se litigants relax, it is a double-edged sword. Not only does Lord Pentland's concern now ring even truer but this lack of solemnity would also have numerous negative effects in the context of asynchronous trials.

One serious consequence is that asynchronous trial participants would likely be less engaged in the proceedings than if they were attending an in-person or synchronous online trial. When people are multitasking, it is hard for them to focus on one thing.[257] This lack of focus could result in participants missing critical details or deadlines, submitting incomplete or poorly prepared materials, or failing to fully comprehend the opposing

254. *See* Graeme Demianyk, *'I'm Not A Cat': Lawyer Gets Stuck In Kitten Filter Mode During Zoom Court Case*, HUFFPOST (Feb. 10, 2021, 10:38 PM), https://www.huffpost.com/archive/au/entry/lawyer-gets-stuck-in-kitten-filter-mode-during-zoom-court-case_au_602354edc5b6f38d06e7fca6 (referencing @lawrencehurley, X (Feb. 9, 2021, 11:26 AM), https://x.com/lawrencehurley/status/1359207169091108864?ref_src=twsrc ("I'm here live, I'm not a cat," says lawyer after Zoom filter mishap. "I can see that," responds judge.)).

255. Summan, *supra* note 22. Lord Pentland expressed these concerns during an online civil justice conference hosted by the Judicial Institute for Scotland on May 10, 2021. *See* Peter Nicholson, *Court, But Not As We Know It*, L. SOC'Y OF SCOT. (June 14, 2021), https://www.lawscot.org.uk/members/journal/issues/vol-66-issue-06/court-but-not-as-we-know-it.

256. *See, e.g.*, MINN. GEN. R. PRAC. 2.03(e) (requiring that "[l]awyers shall appear in court in appropriate courtroom attire," a standard that extends to remote hearings); *see also* MINN. GEN. R. PRAC. 2.01(a) ("Dignity and solemnity shall be maintained in the courtroom whether in person or *using remote technology*. Appropriate courtroom clothing is required." (emphasis added)).

257. *See Why Multitasking Does More Harm Than Good*, WU TSAI NEUROSCIENCES INST.: STAN. UNIV. (May 10, 2021), https://neuroscience.stanford.edu/news/why-multitasking-does-more-harm-good.

side's arguments. Over time, these distractions could undermine the quality of participation, potentially affecting the fairness and accuracy of the trial's outcome. Lawyers also complain that asynchronous trials could lack the excitement and memorable moments of traditional trials.[258] This lack of dynamic engagement ties closely to the concern about diminished participant focus; without the immediacy and interactive nature of traditional or synchronous trials, both lawyers and participants may find it harder to stay fully immersed in the proceedings. Also, for attorneys and judges who work primarily in the asynchronous environment rather than utilizing it for a single case, online-based work could potentially prove detrimental to health, leading to issues like "eyestrain, increased fatigue, low morale, isolation and other negative factors."[259] The cumulative effects of reduced interpersonal interaction and extended screen time could exacerbate feelings of detachment and disengagement, ultimately impacting the quality of participation and decision-making in the judicial process.

However, there are again counterarguments to consider. Excessive solemnity in traditional or synchronous trials can place undue pressure on participants, potentially leading to heightened stress, anxiety, and a diminished ability to present their cases effectively.[260] Engagement levels could also be generational, with younger individuals, who are more accustomed to asynchronous communication, potentially finding it easier to focus and express themselves in more relaxed settings.[261] A less formal environment might enhance their ability to concentrate and communicate effectively.

Moreover, the informal nature of asynchronous trials could make the litigation process less daunting for self-represented litigants. Without the pressure of appearing in a formal courtroom setting, individuals might feel more comfortable presenting their cases, leading to better communication and potentially more favorable outcomes. The asynchronous environment could empower unrepresented individuals, giving them the confidence to navigate the legal process more effectively.[262]

2. Other Losses

Critics commonly identify two other shortcomings of asynchronous trials. First, in an asynchronous presentation of evidence (i.e., evidence that is prepared and submitted in advance), the opposing side and the judge lose the ability to interrupt and ask questions in real time. This means that during the submission of arguments or evidence, neither the opposing counsel nor the judge can immediately seek clarification, challenge

258. *See, e.g.*, Scherer, *supra* note 1 ("[O]ne [lawyer] noted half-jokingly that this reminded him of online training courses that he found terribly boring.").

259. *See* Summan, *supra* note 22.

260. *See generally* Rebecca Nathanson & Karen J. Saywitz, *The Effects of the Courtroom Context on Children's Memory and Anxiety*, 31 J. PSYCHIATRY & L. 67, 71 (2003).

261. *See* DON TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD 78 (2009).

262. *See* HAZEL GENN, SARAH BEINART, STEVEN FINCH, CHRISTOS KOROVESSIS, & PATTEN SMITH, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 93 (1999).

assertions, or probe deeper into the presented material. This real-time questioning is often crucial for addressing ambiguities, exposing inconsistencies, and gaining a clearer understanding of complex issues as they arise—all of which are central to effective advocacy and judicial decision-making.[263] The absence of live questioning would also make it difficult to cross-examine witnesses.[264] Again, some judges and litigants may not be happy with this potential loss. As Lord Pentland incisively suggested,

> interventions and exchanges between the judges and the advocates [in an asynchronous trial] are awkward and stilted. The technology acts as a barrier, inhibiting free-flowing and spontaneous dialogue. The interchange becomes strained and difficult. As a result, the quality of the hearing is diminished. And if the quality of the hearings . . . is reduced in this way, ultimately the quality of our law will suffer.[265]

While the opposing side and the judge could still pose questions, the opportunity to ask questions in the moment and get immediate, unscripted replies would be diminished due to the inherent delays in asynchronous communication. Nonetheless, the element of surprise and similar tactics attorneys often use in traditional trials may not align with the goals of accuracy, fairness, due process, and efficiency.[266] These strategies, while sometimes dramatic and impactful in live settings, can detract from a more methodical and equitable examination of the evidence and issues at hand, which asynchronous trials aim to prioritize.[267]

Another common criticism is that asynchronous trials would further reduce the factfinder's opportunities to observe witnesses' demeanor and body language.[268] Although studies indicate that demeanors are often deceitful and not useful for discerning whether a witness is telling the truth,[269] they are part of the trial enrichment and norms in a traditional in-person trial. Replacing live witnesses' demeanors with a dialogue box,

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263. Scherer, *supra* note 1 ("[T]he ability to ask questions of counsel during the [live] oral hearing is essential.").

264. *Id.*

265. *See* Summan, *supra* note 22.

266. *See* Edith Beerdsen, *Strategy for Strategy's Sake*, 103 N.C. L. REV. (forthcoming spring 2025) (draft at 70).

267. Studies on procedural fairness suggest that when parties perceive the process as unpredictable or biased due to such tactics, their trust in the legal system diminishes. This erosion of trust can result in decreased compliance with court decisions and a general reluctance to engage with legal institutions in the future. Research indicates that perceptions of fairness in legal procedures significantly influence individuals' acceptance of legal authorities and their decisions. Furthermore, the emphasis on surprise can lead to inefficiencies, such as trial delays due to objections and the need for additional time to address unforeseen issues. These disruptions can prolong proceedings, increase costs for all parties involved, and strain judicial resources. *See* Stanislaw Burdziej, Keith Guzik, & Bartosz Pilitowski, *Fairness at Trial: The Impact of Procedural Justice and Other Experiential Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland*, 44 L. & SOC. INQUIRY 359, 361–62 (2019).

268. Scherer, *supra* note 1.

269. *See* Spottswood, *supra* note 253, at 829–30; Bond & DePaulo, *supra* note 253, at 217, 233.

text messages, and audio or video files could have the effect of constantly reminding participants in the trial that something is missing.[270]

In conclusion, asynchronous trials represent a promising yet complex innovation in the judicial process. Their advantages (e.g., enhanced efficiency, increased access to justice, and the ability to reduce bias) make them a compelling option for high-volume, civil small disputes. They offer flexibility and inclusivity—especially for pro se litigants and individuals with disabilities—while also expanding the range of procedural options available in modern courts. However, these benefits are counterbalanced with significant challenges, including diminished solemnity, reduced engagement, and the inability to fully replicate the interactive and dynamic aspects of traditional trials or synchronous online hearings. Additionally, technological barriers and potential procedural justice concerns—such as limitations on real-time questioning and cross-examination—highlight the need for careful consideration. Asynchronous trials hold great potential, but their adoption must be tailored to specific contexts and supported by well-designed procedural and evidence rules to ensure they advance, rather than undermine, the core values of the judicial system.

IV. DESIGNING RULES FOR ASYNCHRONOUS TRIALS

As a new concept, asynchronous trials pose numerous legal, operational, and technological challenges. While the operational challenges of implementing asynchronous trials are an issue for the judiciary, its technological challenges are for the legal tech industry to solve. This Article focuses on addressing the legal challenges. This Part provides initial thoughts about which claim types are amenable to resolution through asynchronous trials and what procedural and evidentiary rules will be necessary to implement asynchronous trials.

A. The Scope of Applicable Cases

Asynchronous trials will likely become a reality sooner or later. That being said, a discussion about the scope of asynchronous trials' application would be a more constructive conversation because this new concept could work well for some types of lawsuits but poorly for others. As the Supreme Court of Florida has rightly pointed out, asynchronous trials would work best for "high volume and low-complexity case[s]."[271] This distinction is

270. This sense of loss may stem from a more abstract attachment participants have to the traditions and spectacle of the traditional in-person trial—its formality, rituals, and the human drama that give it an air of authority and legitimacy. These elements, though not strictly necessary for justice, play a symbolic role that many participants and observers find reassuring and integral to the judicial process. *See* Scott Dodson, Lee H. Rosenthal, & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 JUDICATURE, Fall–Winter 2020–2021, at 13, 17 ("Physical courtrooms feature a judge in a robe, elevated on a bench, with flags, the court seal, and portraits of former jurists, along with the formal cry opening court and the tradition of rising when the judge enters and leaves. These traditions of solemnity and formality bring home the fact that even in the most mundane of hearings in the least complicated of cases, this third branch of government, an institution to cherish and support, is the justice system at work.").

271. Sup. Ct. of Fla., *supra* note 4, at 2.

critical because the nature of the case often dictates the preferred mode of communication. For one, when people encounter a complicated matter that they need to discuss with others, they often prefer to meet in person rather than discussing via email, text, or phone call because face-to-face interactions allow for greater clarity and responsiveness. Additionally, judicial efficiency can only be realized when the number of cases is large enough that judges have multiple asynchronous trials to manage at the same time. Otherwise, trial judges could continue to handle one case at a time. Pilot programs in state courts and overseas have reinforced that high-volume and low-complexity cases are ideal candidates for resolution through asynchronous trials.[272] This category may include civil traffic infractions,[273] small personal injury claims,[274] contractual claims,[275] debt collection,[276] landlord–tenant issues,[277] disputes between neighbors,[278] property disputes,[279] negligence claims,[280] disputes over billing for professional services,[281] and marital disputes.[282]

No asynchronous trial pilot programs have included criminal cases yet. This is largely due to the fact that criminal defendants have heightened constitutional rights, such as the rights to due process, confrontation, and a jury trial.[283] Yet there are a large number of petty crimes—such as fish and wildlife violations, shoplifting, trespassing, and criminal traffic violations—that are punishable only by a fine rather than jail time.[284] These

272. For instance, the Florida Supreme Court has authorized judicial circuits to pilot online court concepts in small claims cases, emphasizing the suitability of such methods for high-volume, low-complexity case types. *Id.* Additionally, the Hawaii State Judiciary has implemented a pilot program for resolving small claims disputes online, further supporting the effectiveness of asynchronous trials in similar contexts. *See Small Claims Online Dispute Resolution Pilot Project*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/small-claims-online-dispute-resolution (last visited Feb. 18, 2025).

273. *See supra* notes 170–72 and accompanying text (discussing how Canada's CRT system resolves several kinds of cases, including motor vehicle accidents); *supra* note 200 and accompanying text (discussing Singapore's aCDR program and how it conducts asynchronous hearings for motor accident claims, personal injury claims, and negligence claims); *see also supra* notes 141–44 and accompanying text (discussing Florida's pilot program).

274. *See supra* note 200 and accompanying text (noting that Singapore's aCDR program conducts asynchronous hearings for personal injury claims).

275. *See supra* notes 128–40 and accompanying text (discussing Michigan's MI-Resolve Civil System, which established Community Dispute Resolution Program centers throughout the state).

276. *About MI-Resolve Civil*, OFF. OF DISPUTE RESOL.: MICH. CTS., https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mi-resolve/MIResolveCivil/ (last visited Mar. 4, 2025).

277. *Id.*

278. *Id.*

279. *Id.*; *see also supra* note 171 and accompanying text (discussing Canada's CRT system resolving real property disputes).

280. *See supra* note 200 and accompanying text (discussing Singapore's aCDR program resolving negligence claims).

281. *About MI-Resolve Civil*, *supra* note 276.

282. *See* Sup. Ct. of Fla., *supra* note 143, at 2 n.1.

283. *See* Sup. Ct. of Fla., No. AOSC20-31, In re: Remote Civil Jury Trial Pilot Program 2 (May 21, 2020), https://supremecourt.flcourts.gov/content/download/636078/file/AOSC20-31.pdf ("Because of the complex constitutional and due process issues presented in criminal cases, such pilot program shall, at this time, be limited to civil cases."); *see also* U.S. CONST. amend. VI.

284. *See* Janet Portman, *Beyond Jail: Fines and Restitution*, NOLO, https://www.nolo.com/legal-encyclopedia/beyond-jail-fines-restitution.html (Jan. 5, 2023).

crimes are even less serious than misdemeanors and therefore may be particularly suited to pioneer asynchronous criminal trials in the future, especially after enough empirical data regarding asynchronous trials of high-volume small claims has been accumulated and especially because a defendant's expenses in a petty crime trial—hiring defense counsel and losing work pay, for example—can be costlier than the fine associated with the offense.[285] Of course, the initial scope of asynchronous trials is not a permanent restriction. As people begin to better understand, embrace, and reap the benefits of asynchronous trials, the scope of these proceedings will inevitably grow.[286] That said, because of the constitutional right to a jury trial in both civil and criminal cases, asynchronous trials should always remain an option rather than a mandate, ensuring defendants retain the choice to pursue traditional proceedings if they so prefer.

B. Procedural Rules for Asynchronous Trials

For asynchronous trials to succeed, the legal profession will need to create rules to structure this process. Like the scope of application for asynchronous trials will expand over time, the procedural and evidentiary rules that structure these trials will also evolve. When rule makers design rules for new adjudicative systems, they should center and balance essential values such as accuracy, fairness, efficiency, and consistency.[287] Considering the characteristics of asynchronous trials, this Article proposes three directions for the future development of procedural rules: (1) designing an integrated multistep process, (2) developing an efficient AI-powered platform, and (3) incorporating both asynchronous and synchronous components.

1. An Integrated System of Asynchronous "ODR + Trial"

Inspired by British Columbia's CRT system[288] (the leading court-annexed asynchronous platform), the most effective design would be an integrated system that offers both pretrial asynchronous ODR and an

285. For instance, in Florida, individuals convicted of misdemeanors or criminal traffic offenses are required to pay additional court costs, which can include a $50 assessment under FLA. STAT. § 938.05 (2024) and other mandatory surcharges. These financial obligations, combined with potential expenses such as hiring defense counsel and lost wages due to court appearances, can cumulatively exceed the fines associated with the offense itself. This financial burden underscores the need to explore more efficient and cost-effective adjudication methods, such as asynchronous trials, particularly for high-volume, low-complexity cases. *See* FLA. STAT. § 938 (2024).

286. *See, e.g.*, Quaintance, *supra* note 121 ("The platform these folks have built is robust enough that we can take it to any level," Utah Supreme Court justice Constandinos Himonas said. "It's not just small claims cases. It's traffic, it's misdemeanors, it's family law, it's district court cases.").

287. The Administrative Conference of the United States (ACUS) emphasizes that agencies should develop quality assurance systems to promote these values in their adjudicative programs. *See* ADMIN. CONF. OF THE U.S, QUALITY ASSURANCE SYSTEMS IN AGENCY ADJUDICATION 1, 3–4 (2021); *see also* Baosheng Zhang, *Reflecting on Development of Evidence Law in China*, B.U., https://www.bu.edu/ilj/files/2015/03/Baosheng-Zhang-Reflecting-on-Development-of-Evidence-Law-in-China.pdf (last visited Jan. 25, 2025) (describing how when rule makers design rules for new adjudicative systems, the four essential values they should center and balance are accuracy, fairness, harmony, and efficiency).

288. *See supra* Section II.B.1 for a detailed discussion of CRT.

asynchronous trial option for when the parties cannot reach an agreement through ODR. The ODR process should include initial asynchronous negotiation between the parties, followed by asynchronous mediation with a court-trained facilitator if an agreement cannot be reached in the negotiation. Asynchronous negotiation and mediation may be more effective than their synchronous counterparts in helping small claim disputants reach a settlement because each side would have more time to cool down and reflect on their positions and interests before interacting with the opposing side, and the use of written messages would allow for a less intense, emotional, and adversarial environment. And even if the parties could not reach an agreement through the asynchronous ODR process, an asynchronous trial would still be relatively simple because the system would preserve all the written communications between the parties, which the trial judge could also review. Thus, during the asynchronous trial, the judge could easily identify the issues still in dispute and instruct the parties to limit their arguments and evidence to those issues.

2. An Efficient Mechanism Empowered by AI

Asynchronous trials would best serve their function if they are structured by procedural rules to facilitate the process. For example, to avoid wasting time, rules should prescribe time limits for tasks such as sending entries and responding. To avoid disproportionality—where the time, effort, or resources required for one party's submission far exceed what is reasonable or necessary in relation to the case—rules should impose word count and size limits for submissions. Further, asynchronous trial platforms should include an entry-undo function to allow participants to correct errors or revise their submissions as well as ensure accuracy and reduce anxiety for participants—especially pro se litigants—who may feel uncertain about their initial submissions. However, to maintain efficiency and prevent misuse, time and frequency limits would be necessary.

Rules are necessary, but one size does not fit all. Instead of imposing rigid procedural rules, courts could adopt tailored rules for each case based on factors such as the type of case, the degree of difficulty, choices made by the parties, the time zones of the parties and witnesses, the availability and accessibility of technology, the presence of self-represented litigants, the urgency of the matter, the volume of evidence to be presented, and any specific accommodations needed for participants with disabilities. However, a system of case-by-case determinations that require parties and judges to negotiate procedural rules would prohibitively elevate the systematic cost of the asynchronous trial, making it a less attractive option for handling small claims.[289]

289. These increased costs would stem from the time and resources needed for judges to design bespoke procedures, the additional administrative burden on court staff, and the potential delays caused by extended negotiations between parties over procedural details. This added complexity could

To mitigate these costs, modern technologies like artificial intelligence (AI) could help optimize the process of defining procedural rules for individual cases. Rather than wasting time and resources negotiating procedural rules before an asynchronous trial, the parties would only need to tell an AI-powered system their respective situations and requirements.[290] Then, the system would use the submitted data to create time and submission rules based on the procedural metrics and circumstances of the case.[291] The system could also provide options (e.g., a time-condensed, regular, or relaxed timeline) for the parties to choose from. To cut down on repetitive tasks for judges and law clerks, the AI-powered system could automatically send notifications of new activity and deadline reminders to the parties. Similarly, when a deadline has passed, a submitted file is too large, or an entry is over the word limit, the system could automatically block the involved party from taking further action and provide a channel for the party to seek human assistance, with an opportunity to explain their rule violation if necessary.[292]

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undermine one of the primary advantages of asynchronous trials—efficiency—making them a less attractive option for resolving small claims and other high-volume, low-complexity cases. Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 920 (2020) (describing how specific procedural rules can burden the courts and other parties with extra costs).

290. For example, parties could inform the system about logistical constraints, such as time zone differences, availability for participation, or limitations on Internet access and technology. They might also specify preferences for communication methods (e.g., text-based submissions versus audio or video), the expected volume and complexity of evidence, the need for accommodations due to disabilities, or any concerns about confidentiality or security. The system would then use this information to generate tailored procedural frameworks that balance efficiency, fairness, and the specific needs of the case, and that reduces administrative burden while maintaining the cost-effectiveness of asynchronous trials.

291. In this context, "procedural metrics and circumstances" refer to the specific details and requirements of a case that influence how procedural rules should be tailored. These include factors such as the complexity of the legal issues, the volume of evidence, the number of parties involved, time zone differences, participants' availability, technological capabilities, and any special accommodations needed (e.g., for disabilities). For example, consider a civil dispute involving parties in different time zones, with one party requiring accommodations for a visual impairment. An AI-powered system could analyze these factors and establish procedural rules that:

- Set flexible deadlines to account for time zone differences, ensuring all parties have adequate time to respond.
- Recommend accessible formats for document submissions to accommodate visual impairments, such as screen reader-compatible files.
- Limit the length of submissions to maintain clarity and focus, enhancing efficiency in case management.

By considering these procedural metrics and circumstances, the AI system creates a customized framework that promotes fairness and efficiency in the asynchronous trial process.

292. While AI has made significant strides in legal practice management, including automating routine tasks and enhancing document review processes, the specific application of AI to dynamically generate procedural rules tailored to individual case metrics is an emerging area. Current AI tools excel in tasks such as contract analysis, legal research, and case management efficiency. For instance, AI-driven platforms can assist in drafting legal documents, managing case timelines, and automating document filing, thereby improving overall efficiency in legal operations. However, the development of AI systems that are capable of analyzing complex case-specific factors to generate customized procedural rules is still in its nascent stages. Ongoing advancements in AI and machine learning are

An AI-powered system could have additional value-added functions. For example, it could provide pro se litigants with templates and clear, step-by-step instructions, similar to what ChatGPT returns when asked for help. These tools could help self-represented litigants navigate complex legal processes more effectively, reducing confusion and promoting compliance with procedural rules.

Additionally, the system could flag parties or lawyers who are frequent users of the platform. This would notify the judge and the opposing party of potential disparities in platform experience, which might otherwise create an uneven playing field. While merely notifying participants of these disparities does not directly address the disadvantage faced by a less-experienced party (typically a pro se litigant), the information could prompt corrective measures. For instance, a judge could exercise discretion to offer additional procedural guidance, grant flexibility in compliance with procedural rules, or ensure that instructions and resources are made readily available to the less-experienced party. By identifying and acknowledging these imbalances, the system would create opportunities to mitigate the disadvantage and promote a more equitable process.

Rather than writing detailed procedural rules, asynchronous trial rule makers should work closely with the software engineers building the AI-powered system to set up procedural metrics as well as test and optimize pertinent algorithms behind the scenes.[293]

3. A Hybrid Asynchronous–Synchronous System

Successful asynchronous systems like Canada's CRT and Singapore's aCDR demonstrate that a system does not need to stick to a rigid asynchronous mode from beginning to end; instead, an ideal system would be able to switch between asynchronous and synchronous modes when

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expected to expand these capabilities, enabling more sophisticated applications in legal case management in the future. *See* Sara Merken, *Illinois Top Court Say Judges and Lawyers Can Use AI, with Limits*, REUTERS (Dec. 19, 2024, 12:11 PM), https://www.reuters.com/legal/government/illinois-top-court-say-judges-lawyers-can-use-ai-with-limits-2024-12-19; Richard Susskind, *AI Won't Just Speed Up the Legal System—It Will Revolutionise It*, THE TIMES (Dec. 12, 2024, 12:01 AM), https://www.thetimes.com/uk/law/article/ai-wont-just-speed-up-the-legal-system-it-will-revolutionise-it-lc308nkmq.

293. In most cases, states would likely contract with private companies rather than relying on state-employed software engineers. This approach would allow access to specialized expertise, reduce development time, and leverage the scalability of customizable software. A private company could design a system capable of being tailored to meet the needs of multiple states, thereby distributing development costs across jurisdictions and reducing individual state expenses. For example, a company could provide core functionality—such as document submission protocols, time tracking, and user guidance—with options for states to integrate unique legal requirements or procedural rules. These dynamics could significantly impact the overall cost-effectiveness of adopting asynchronous trials. A shared software platform used across jurisdictions could dramatically reduce costs compared to each state developing its own system independently. However, relying on private contractors could introduce other considerations, such as ongoing licensing fees, data security concerns, and the potential for vendor lock-in, where states become dependent on a single provider for updates and support. States approaching this collaboratively (i.e., pooling resources to develop a shared or open-source platform) could further enhance cost-effectiveness while maintaining flexibility for customization.

warranted.[294] Efficiency is the key consideration. A hybrid system could take advantage of each mode's strengths and avoid their respective weaknesses. Of course, the sort of system proposed in this Article would be asynchronous by default, but rule makers will need to consider what conditions should trigger a synchronous hearing and what procedural rules should apply in synchronous hearings embedded within an asynchronous trial.

C. Evidentiary Rules for Asynchronous Trials

While most states have adopted a variation of the Federal Rules of Evidence (FRE),[295] the FRE would not be a good fit for asynchronous trials. First, asynchronous trials—at least initially—would need to be bench trials, for which the FRE are not suitable.[296] The FRE provide admissibility rules that presume a bifurcated system, in which a gatekeeper (the judge) screens the evidence, and a factfinder (the jury) weighs only the screened evidence.[297] In an asynchronous trial, however, the judge would be both gatekeeper and factfinder, meaning the traditional evidence admissibility rules that the FRE prescribe may not make sense. Logically, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."[298] And practically speaking, psychological studies have consistently shown that humans have trouble "unringing the bell" after hearing inadmissible evidence.[299] A fused gatekeeper–factfinder situation thus requires a different approach.[300]

Second, the FRE are complex, in part because they were designed by and for trained attorneys, not laypeople.[301] By contrast, a significant number of litigants in asynchronous trials would presumably be self-represented. Pro se litigants typically struggle with complex evidentiary rules, which creates a barrier to access as well as administration problems for judges.

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294. *See supra* Sections II.B.1–.2 for a detailed discussion.

295. *See* GEORGE FISHER, EVIDENCE 2–3 (4th ed. 2023) ("At last count forty-five states and Puerto Rico have adopted or mimicked the Federal Rules [of Evidence] in whole or greater part . . . . Even the five states that have adopted distinct evidence codes or have not codified their evidence law—California, Kansas, Massachusetts, Missouri, and New York—adhere to similar evidence principles.").

296. *See* Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 272–73 (2022) (Technically, the Federal Rules of Evidence, apply to both jury and bench trials (in federal courts). However, in practice, trial judges often apply these rules loosely when they sit without a jury. Time and again in bench trials, objections to the admissibility of evidence are met with the judicial response of, "I'll let it in and just give it the weight it deserves.").

297. *See id.* at 301–03.

298. United States v. Brown, 415 F.3d 1257, 1269 (11th Cir. 2005).

299. *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 36–39 (2004) (discussing the persistence of confession evidence even when deemed inadmissible or coerced); David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 414–19 (2013).

300. *See* Wang, *supra* note 296, at 263.

301. *See* Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1076 (2022) ("The American civil court is designed for two competing adversaries to face off against one another.").

Third, the main type of evidence that the FRE cover is live witness testimony. The FRE include numerous hearsay rules, which frequently preclude written evidence in favor of live witness testimony.[302] Only a few scattered portions of the FRE address the use of written evidence.[303] In asynchronous trials, the situation would be the opposite: written evidence, including ESI, would be the primary form of evidence, while video, audio, or live witness testimony would likely only show up in exceptional circumstances.

The conventional alternative to the FRE, a system of "free proof" with little to no evidentiary restrictions, would not fare any better.[304] As psychological research has long demonstrated, human decision-making is fallible, and even the most experienced and well-intentioned decision-makers can benefit from evidentiary strictures.[305] Evidentiary rules also promote consistency across adjudicators, contributing to fairness and reinforcing the rule of law.

Therefore, within the realm of asynchronous trials, the FRE are ill-fitting and unrealistic but "free proof" is also insufficient. Is there some practical middle ground? Are they ways to tailor a set of evidentiary rules for the asynchronous trial? Below are some preliminary ideas in need of further development.

1. Rule Simplification

If the traditional FRE were to serve as the baseline, then key modifications or simplifications would be necessary to adapt them for asynchronous trials. One promising approach could involve streamlining or replacing rules governing oral testimony—an essential element of in-person trials—with standards that are specifically tailored to accommodate written and prerecorded evidence submissions, which are more suited to the asynchronous format.

2. Pro Se Adjustment

Many participants in asynchronous trials, particularly in small claims or high-volume civil disputes, are likely to be pro se litigants without formal legal training. It is essential to modify evidentiary rules to accommodate these individuals. This might include simplifying legal language,

302. *See* Henry Zhuhao Wang, *One Size Does Not Fit All: Alternatives to the Federal Rules of Evidence*, 76 VAND. L. REV. 1709, 1717 (2023) ("The trial process is essentially a show of witnesses being directed and cross-examined as they describe their personal observations, provide opinions of character, offer scientific explanations, and, sometimes, narrate their own story.").

303. *See* Cheng & Nunn, *supra* note 57, at 1077 ("Documentary or physical evidence rarely stands on its own.").

304. *See* Wang, *supra* note 296, at 286–89; Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 169 (2006).

305. *See* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 238 (2019) ("Both jurors and judges have difficulty correctly interpreting evidence grounded in statistics and probability."); Wang, *supra* note 296, at 289–92.

providing step-by-step instructions for evidence submission, and incorporating user-friendly templates into the trial process.

3. Rule Tailoring

Authentication and identity verification must be prioritized in asynchronous trials, especially in an era where digital manipulations such as deepfakes pose significant challenges.[306] Enhanced rules for verifying the authenticity of digital evidence and confirming the identity of parties and witnesses will be critical to maintaining trust in the system. At the same time, rules governing oral testimony and hearsay evidence could be relaxed or adapted to reflect the reality of asynchronous formats, where written or prerecorded evidence takes precedence over live testimony.

4. Evidence Editing

Written, audio, and video evidence in asynchronous trials would undergo editing before submission. Properly edited evidence can enhance clarity and efficiency for judges by eliminating unnecessary modal particles,[307] repetitive rhetoric, or extraneous details. However, excessive editing risks altering the original context, meaning, and value of the evidence, which could lead to distortions or fabrications. Guidelines need to be developed to define permissible edits while safeguarding the integrity of the evidence. For instance, rules might require parties to submit both the edited version and the original, unaltered evidence for comparison when appropriate.

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These ideas reflect the initial steps in building a tailored evidentiary framework for asynchronous trials, balancing the need for flexibility, fairness, and efficiency. The interplay between procedural and evidentiary rulemaking and technological innovation will be critical and require collaboration between legal experts and technologists. Future work in this area should explore empirical testing of proposed rules, assess the specific challenges posed by different case types, and evaluate how these

306. In the traditional setting of synchronous trials, proving that a video or audio recording is a deepfake can be challenging, especially as the technology becomes more sophisticated. It becomes even harder to authenticate such evidence in asynchronous trials due to lack of the eye-to-eye, face-to-face component. *See* Sara H. Jodka, *Manipulating Reality: The Intersection of Deepfakes and the Law*, REUTERS (Feb. 1, 2024, 10:01 AM), https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01.

307. Modal particles are a type of word or phrase commonly used to express the speaker's attitude, mood, or perspective toward the statement being made, rather than conveying concrete information. Modal particles often serve to soften, emphasize, or add nuance to a statement, making it more polite, casual, assertive, or tentative. Gulnar Karimli, *General Characteristics of Modal Particles in English and Other Languages*, 1 EURO-GLOBAL J. LINGUISTICS & LANGUAGE EDUC. 149, 149 (2024). For example, words or phrases like "well," "just," or "you know" might serve such a function in certain contexts, softening or adding nuance to statements (e.g., "Well, that's not what I meant." Or "You know, it might not be that simple."). In the context of evidence editing for asynchronous trials, removing modal particles (when appropriate) could make written or prerecorded statements clearer and more focused, enhancing judicial efficiency by reducing ambiguity or unnecessary verbosity.

adaptations impact judicial outcomes. Ultimately, the success of asynchronous trials will depend not only on their efficiency but also on their ability to uphold the principles of justice, transparency, and equity in a rapidly evolving legal landscape.

CONCLUSION

Justice is a thing, not a place or specific point in time.[308] Asynchronous communication is both rapidly becoming the norm in many aspects of modern life and already outpacing other forms of interaction. Now is the time for law reformers to reimagine the asynchronous trial as a viable and innovative alternative to the traditional synchronized trial, particularly for high-volume civil adjudications.

This forward-looking development would allow the judicial system to evolve alongside societal advancements, inject new vitality into its processes, and enhance efficiency while preserving fairness. By embracing asynchronous trials, courts can contribute to the ideals of process pluralism, ensuring that litigants have multiple procedural options tailored to their unique needs and circumstances. Most importantly, asynchronous trials hold the potential to significantly expand access to justice by breaking down barriers for individuals who are otherwise disadvantaged by traditional trial models.

Asynchronous trials are not a panacea. They represent a critical step forward in reimagining the future of justice. As the legal community explores the complexities and implications of this innovation, it must balance the promise of efficiency with the imperative to safeguard justice, fairness, and transparency. With careful planning, collaboration, and commitment, asynchronous trials can become a transformative force in modern adjudication and reshape the way we achieve and deliver justice.

308. "Justice is a thing. Justice is not a place." Quaintance, *supra* note 121 (quoting Utah Supreme Court Justice Himonas).